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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

S. Mohamed Ismail and others .. *Appellants* *

v.

M. S. Mohamed Essa and others .. *Respondents.*

Specific Relief Act (XLVII of 1963), *section* 38—*Civil Procedure Code (V of* 1908), *Order* 41, *rule* 3—*Trade and Merchandise Marks Act (XLIII of* 1958), *section* 105 (c) —*Suit for permanent injunction—Partnership —One partner retiring—Prohibition not to carry on business within city limits—Business started in another name—Whether within prohibition—Injunction granted by lower Court —Validity —Whether violation of Trade and Merchandise Marks Act.*

Two brothers, I and E, were carrying on business as a partnership within the City of Madras in the name and style of M. M. Mohammad Saleh. *E* retired from the firm. Under clause (8) of the partnership deed the outgoing partner, would not be entitled to any goodwill and should not open a similar business in the name of the previous partnership. *E* left the City and carried on business in Madurai. Subsequently he returned to Madras and opened a business in partnership under the name and style of " Saleh Machinery Stores " in the same street. *I* and his firm filed a suit against *E* and his partners for a permanent injunction. *E* was the first defendant ; " Saleh Machinery Stores " was the second defendant. The third defendant was the wife of *E* and the fourth defendant was the brother-in-law of *E*. The third and fourth defendants were alleged to be namelenders. The trial Court granted a decree as prayed for on the findings that the business actually belonged to *E* and the 3rd and 4th defendants were only benamidars for *E* and the business of " Saleh Machinery Stores " traded in goods similar to those of the plaintiff. Aggrieved by the decision the 2nd, 3rd and 4th defendants filed an appeal and the appeal was allowed on the finding that the business of " Saleh Machinery Stores " belonged only to *E* and not to the 3rd and 4th defendants, and that on the contention of the 2nd, 3rd and 4th defendants raised under section 105 (*e*) of the Trade and Merchandise Marks Act, 1958, there was no attempt by them to pass off the goods as those of the plaintiffs. The plaintiff filed a second appeal.

Held, that the decision of the trial Court was only with reference to clause (8) of the partnership deed between *I* and *E*. As such, even though the appellants before the lower appellate Court averred that " Saleh Machinery Stores " was not similar to the firm of 'M. M. Mohammad Saleh ' the same cannot be common ground for the first defendant *E* also, inasmuch as the first defendant *E* alone was bound by clause (8) of the partnership deed between *I* and *E*. Hence Order 41, rule 4, Civil Procedure Code, could not be relied on to support the decision of the lower appellate Court. In view of the finding of the lower appellate Corrt that defendants 2 to 4 were only benamidars, a decree against defendants 2 to 4 can stand independently and there cannot be any inconsistency, contradictoriness or unworkability if the order was passed against defendants 2 to 4. Taking into consideration the evidence on record, the concurrent findings arrived at by the Courts below to the effect that defendants 3 and 4 were benamidars, cannot be interfered with.

* S.A. No. 1164 of 1971. 20*th December*, 1973.

The suit would not fall under section 105 (*c*) of the Trade and Merchandise Marks Act, 1958. The suit was decreed as prayed for. [*Para* 12, 13 *and* 14.]

Case referred to:

Nirmala v. *Balai Chand*, (1966) 2 S.C.J. 426: (1965) 3 S.C.R. 550: A.I.R. 1965 S.C. 1874.

Appeal against the decree of the Court of the City Civil Judge (First Additional Judge), Madras in Appeal Suit No. 406 of 1969 preferred against the decree of the Court of the City Civil (VI Assistant Judge) of Madras in Original Suit No. 1905 of 1967.

T. R. Ramachandran, for Appellant.

Venkatachalapathy, for 1st Respondent.

Balathandapani, for 3rd and 4th Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs in the suit are the appellants. Their suit was for a permanent injunction restraining the defendants from opening and carrying on a business in city limits similar to that of the plaintiffs under the name and style of 'M. M. Mohammad Saleh' or any other name which is deceptively similar to it. First plaintiff and the first defendant are brothers. They were conducting a registered partnership at No. 1-79, Sembudoss Street, G. T., Madras. The first defendant retired from the partnership. Under clause (8) of the partnership deed, the outgoing partner shall not be entitled to the goodwill or to any payment on account of the goodwill and shall not be entitled to open a similar business in the name of 'M. M. Mohammad Saleh' in city limits. The first defendant left the City and opened a shop at Madurai. Subsequently, he returned to Madras and has opened a similar business in hardware materials at No. 15, Sembudoss Street, under the name and style of "Saleh Machinery Stores". The second defendant is the firm which was started with the funds of the first defendant. The third defendant is the wife and the fourth defendant is the brother-in-law of the first defendant; they are merely benamidars and namelenders for the first defendant. The first defendant is carrying on the business and he should not be permitted to circumvent the clause in the partnership deed. On these allegations, the first plaintiff impleading his firm 'M. M. Mohammad Saleh' as the second plaintiff, brought the suit for permanent injunction.

2. The first defendant, in his written statement, contended that under the deed of partnership he was prohibited only from carrying on similar business under the name and style of 'M. M. Mohammad Saleh', that he has not committed any breach of the agreement, that the first defendant is not carrying on any business and that the agreement between the first defendant and the first plaintiff will not bind anyone else. His further contention was that even otherwise the condition laid down is opposed to law and natural justice.

3. Defendants 2 to 4, in their written statement, contended that they were not aware of the business carried on by the first plaintiff and the first defendant. They denied the allegation that they are merely namelenders. Their further contentions were that the business carried on by them is not similar to the firm of the first plaintiff, that they are entitled to carry on business in any name or in any commodity or in any place and that the first plaintiff is not entitled to any relief and these defendants are entitled to compensatory costs.

4. The trial Court, after framing the necessary issues, and on the evidence adduced, came to the conclusion that clause (8) of the partnership deed (Exhibit A-1) prohibiting the outgoing partner from carrying on similar business in the city under the name and style of 'M. M. Mohammad Saleh' is a reasonable restriction, and enforceable, as the first defendant had released his rights in the partnership and walked out. It also found that the first defendant advanced his moneys for starting Saleh Machinery Stores, a business in pipes, pipe-materials, motor pump sets etc., and was responsible for starting that business and has been attending to it, and that defendants 3 and 4 are benamidars for the first defendant. The trial Court also found that the first defendant started the business under the name and style of 'Saleh Machinery

Stores', in similar goods, only to induce the customers of the plaintiff to become his customers by deception and thereby attract and appropriate the business of the plaintiffs for himself and that the plaintiffs are entitled to the injunction. On these findings, the trial Court decreed the suit with costs.

5. Aggrieved by the said decision, defendants 2, 3 and 4 preferred A.S. No. 406 of 1969, on the file of the First Additional Judge, City Civil Court, Madras. The lower appellate Court allowed the appeal on the findings and observations :

> "There is identity of the business carried on under the two names. But there is no identity in the similarity of the names. Nor is there any evidence to show that any confusion is likely to be created or apprehended by the business carried on under the name of Saleh Machinery Stores being thought of by any person or persons exercising ordinary caution as the business carried on by M. M. Mohammad Saleh."

> "The name Saleh Machinery Stores is also not deceptively similar to the name M. M. Mohammad Saleh. Therefore, respondents 1 and 2 (plaintiffs would not be entitled to the permanent injunction prayed for."

The result was the suit was dismissed with costs. On the question of benami, the lower appellate Court found that the business "Saleh Machinery Stores" "belongs only to the third respondent (first defendant) and not to appellants 2 and 3 (defendants 3 and 4) and that appellants 2 and 3 (defendants 3 and 4) are mere benamidars for the third respondent (1st defendent)". As regards the contention raised by defendants 2, 3 and 4 questioning the jurisdiction of the Court in view of section 105 (*c*) of the Trade and Merchandise Marks Act, 1958, the lower appellate Court held that the case on hand is not an action for passing off any goods as the goods of the plaintiffs and that therefore the trial Court had jurisdiction to entertain the suit.

6. Aggrieved by the decision of the lower appellate Court, the plaintiffs have preferred this second appeal. Thiru T. R. Ramachandran, the learned Counsel appearing for the appellants, contended that in view of the fact that the first defendant had not appealed against the decision of the trial Court which found that he (first defendant) had infringed clause (8) of the partnership deed, that decision of the trial Court as against him has become final. In view of the fact that the lower appellate Court has also found that the first defendant is the real owner of "Saleh Machinery Stores", it ought to have dismissed the appeal, confirming the decree of the trial Court. Thiru T. R. Ramachandran further contended that the right put forth by defendants 2, 3 and 4 is independent of that of the first defendant and as such they can succeed only if they can establish their independent right in "Saleh Machinery Stores"; but once it is held that the said business is that of the first defendant, the decision arrived at by the trial Court to the effect that such a business infringes clause (8) of Exhibit A-1 has become conclusive as against the first defendant. Thiru T. R. Ramachandran also cited to his support decisions, which I will consider presently.

7. Thiru Venkatachalapathy, the learned Counsel appearing for the 1st defendant (first respondent) herein contended that the common defence of all the defendants is that there is no similarity in the names of the two businesses 'M. M. Mohammad Saleh' and 'Saleh Machinery Stores" and that as such from the mere fact that the defendant had not preferred an appeal against the decision of the trial Court to the Court he is not precluded from giving a finding in appeal as regards similarity in the names. "According to Thiru Venkatachalapathy, the learned Counsel for the first defendant the question of similarity is a common defence raised by all the defendants and that as such the lower appellate Court has jurisdiction to go into this question and render a decision thereon which will definitely enure to the benefit of all the defendants including the first defendant. The learned Counsel brought to his support the provisions of Order 41, rule 4 and rule 33, Civil Procedure Code.

8. Thiru Balathandapani, the learned Counsel for defendants 3 and 4 (respondents 3 and 4 herein), while stressing the point submitted by Thiru Venkatachalapathy, also submitted that his clients are not benamidars for the first defendant and that in any event the suit was in effect one under section 105 (*c*) of the Trade and Merchandise Marks Act, 1958, and as such the judgment of the trial Court is without jurisdiction.

9. I have been taken through the pleadings and other relevant documents in the case. There is a clear averment in the plaint to the effect that the second defendant-firm was started with the funds of the first defendant and that the third defendant, who is the wife, and the fourth defendant, who is the brother-in-law of the first defendant, are only benamidars and namelenders for the benefit of the first defendant. It is further averred in the plaint that the first defendant should not be permitted to circumvent the clause in the partnership deed Exhibit A-1 by creating a firm in the names of defendants 3 and 4 and that all the defendants should be prevented by an injunction restraining them from doing any business in the name of the second plaintiff or in any name which is deceptively similar to 'M. M. Mohammad Saleh'. It has been further stated in the plaint that the plaintiffs had already become entitled to the goodwill of the firm 'M. M. Mohammad Saleh' by a decree in the City Civil Court in O. S. No. 856 of 1957 and that the first defendant is bound by clause (8) of the partnership deed dated 1st April, 1958. Clause (8), Exhibit A-1 reads as follows :—

> " In view of the two partners having taken over the business coming from their father who was originally carrying on this business of M. M. Mohammed Saleh it is hereby agreed that in the event of any of the partners going out of the partnership the outgoing partner shall not be entitled to the goodwill nor to any payment on account of the goodwill and shall not be entitled to open a similar business in the name of M. M. Mohammed Saleh in the city limits."

It is clear from the above that the first defendant should not open a similar business in the name of 'M. M. Mohammed Saleh' in the City Limits.

10. According to the first defendant, defendants 3 and 4 have opened a similar business, not in the name of 'M. M. Mohammad Saleh' but in the name of "Saleh Machinery Stores", The first defendant completely disowned any right in the said business. Incidentally, the first defendant has averred in his written statement that he has not committed any breach of the agreement contained in clause (8) of Exhibit A-1.

11. Considering the averments in plaint to the effect that the first defendant should not be allowed to carry on similar business in any name which is deceptively similar to 'M. M. Mohammad Saleh', and also considering the terms of clause (8) of the partnership deed Exhibit A-1, the trial Court found that the first defendant has infringed clause (8) of the agreement and as such granted the injunction as prayed for.

The first defendant had not preferred any appeal against this finding of the trial Court. As far as defendants 2 to 4 are concerned, they are not bound by the terms of clause (8) of Exhibit A-1. No doubt, they have averred, in their written statement, that the business carried on by them is not similar to that of the second plaintiff. The trial Court considered them as 'benamidars' for the first defendant, and decreed the suit. On appeal, by defendants 2 to 4, the lower appellate Court, despite its finding that defendants 3 and 4 are only benamidars for the first defendant and despite the fact that the first defendant had not preferred any appeal, dismissed the suit holding that the name Saleh Machinery Stores, is not deceptively similar to the name 'M. M. Mohammad Saleh'.

12. It is significant to note that the right of the first defendant stands entirely on a different footing than that of defendants 2 to 4. The discussion by the trial Court as regards the right of the first defendant is with reference to clause (8) of Exhibit A-1. But as far as defendants 3 and 4 are concerned, their case is entirely different, and they claim

an independent right in Saleh Machinery Stores, while the first defendant completely disowns the said business. The finding of the trial Court has been arrived at on the basis that the first defendant is the real owner and that the business carried on under the name and style 'Saleh Machinery Stores' is offending clause (8) of Exhibit A-1. The said finding against the first defendant has become conclusive since he had not preferred any appeal. To discuss and decide the question as to whether defendants 3 and 4 are carrying on any business which is deceptively similar to that of the plaintiffs, is not the scope of the suit at all. Such a thing will be only academic and outside the prayer in the plaint. Once it is held that defendants 3 and 4 are the owners of 'Saleh Machinery Stores' the suit has to fail automatically since they are not parties to Exhibit A-1. But, it is found that the first defendant is the owner of 'Saleh Machinery Stores'. The finding that the first defendant has violated clause (8) of Exhibit A-1, which had not been appealed against, is conclusive and the lower appellate Court, in my view, cannot grant a decree which will in effect give a relief to the first defendant with reference to whom the judgment and decree of the trial Court have become conclusive and binding.

Order 41, rule 4, Civil Procedure Code, reads :—

> "Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs, or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree and thereupon the Appellate Court may reverse or vary the decree, in favour of the plaintiffs or defendants as the case may be."

From the above provision, it is clear that the ground of the decision appealed from must be common to all the plaintiffs or to all the defendants, as the case may be; then only, the appellate Court can reverse or vary the decree in favour of the plaintiffs or the defendant, as the case may be. But as far as the present case is concerned, the appellants before the lower appellate Court (defendants 2 to 4) have nothing to do with clause (8) of Exhibit A-1. The decision rendered by the trial Court was only with reference to clause (8) of Exhibit A-1. As such, even though the appellants before the lower appellate Court averred that 'Saleh Machinery Stores' is not similar to the firm 'M. M. Mohammed Saleh' the same cannot be taken as a 'common ground' for the first defendant also, inasmuch as the first defendant alone is bound by clause (8) of Exhibit A-1. Hence Order 41, rule 4, Civil Procedure Code, cannot be relied on to support the decision of the lower appellate Court.

Order 41, rule 33, Civil Procedure Code, runs as follows :

> "The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."

As I have already stated, there are two sets of defendants. The first defendant belongs to the first set and he completely disowned 'Saleh Machinery Stores', and the relief claimed by the plaintiff against this defendant was only with reference to clause (8) of Exhibit A-1. The second set consists of defendants 3 and 4, who claimed absolute right in 'Saleh Machinery Stores', and against whom the plaintiffs have not claimed any relief with reference to clause (8) of Exhibit A-1. In the background of these facts, we have to consider whether Order 41, rule 33, Civil Procedure Code, will be of any help to support the decision of the lower appellate Court.

In *Nirmala* v. *Balai Chand*[1], the Supreme Court observed :—

1. (1966) 2 S.C.J. 426: (1965) 3 S.C.R. 550: A.I.R. 1965 S.C. 1874.

"There were therefore two sets of defendants in the suits and in substance two decrees though related were passed. One of the decrees can stand apart from the other. When a party allows a decree of the Court of First Instance to become final, by not appealing against the decree, it would not be open to another party to the litigation, whose rights are otherwise not affected by the decree, to invoke the powers of the appellate Court under Order 41, rule 33 to pass a decree in favour of the party not appealing so as to give the latter a benefit which he has not claimed. Order, 41, rule 33 is primarily intended to confer power upon the appellate Court to do justice by granting relief to a party who has not appealed, when refusing to do so, would result in making inconsistent, contradictory or unworkable orders. We do not think that power under Order 41, rule 33 of the Code of Civil Procedure can be exercised in this case in favour of the deities."

In my opinion, the decree of the trial Court, in the instant case, against the first defendant, can stand independently of the right claimed by defendants 2 to 4. In view of the finding of the lower appellate Court that defendants 2 to 4 are only benamidars, the reliefs which it granted in effect give a relief to the first defendant who had not appealed from the decree and judgment of the trial Court. Further, a decree against defendants 2 to 4, in my opinion can stand independently and there cannot be any inconsistency, contradictoriness or unworkability if the order is passed only as against defendants 2 to 4.

13. Thiru Balathandapani, the learned Counsel appearing for defendants 3 and 4 contended that the Courts below have not considered the question of benami. He also submitted that the onus has been shifted upon defendants 3 and 4 and as such the question of benami has been wrongly decided. As regards the benami nature of the business, both the Courts have concurrently found that the first defendant is the real owner and that defendants 3 and 4 are benamidars. All the evidence on record has been properly discussed by the Courts below. In my view, the burden of proof assumes little importance when all the evidence, is before the Court and has been discussed and decided on. Taking into consideration the evidence on record, the concurrent finding arrived at by the Courts below to the effect that defendants 3 and 4 are benamidars, cannot be interfered with.

14. I do not think there is any substance in the argument of the learned Counsel for the third and fourth defendants to the effect that the suit will fall under section 105 (*c*) of the Trade and Merchandise Marks Act, 1958. The lower appellate Court has correctly considered this aspect and has rejected the contention.

15. Under these circumstances, the second appeal is allowed, with the result that suit is decreed as prayed for. There will be no order as to costs. No leave.

S. J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*M. M. Ismail, J.*

T. Velappan .. *Petitioner**

v.

Superintendent of Central Excise, Erode M. O. R., Erode and another .. *Respondents.*

Produce Cess Act (XV of 1966), *section* 9—*Assessment of occupier of mill—Notice—Particulars to be provided—Mere notice of demand without assessment invalid—Article* 226, *Constitution of India—Issue of* certiorari.

Where an occupier of a mill submitted returns from April, 1970 to August, 1970 and the Collector without making an assessment under section 8 of the Produce Cess Act, 1966, demanded a consolidated sum as cess payable for 1967-68, 1968-69, 1969-70 and for April to August, 1970 and sent the notice calling upon the occupier to pay the amount within 10 days warning that in default of payment of the amount as directed action to recover

*W.P. No. 90 of 1972. 15th November, 1973.

the amount would be taken under section 12 of the Act, such a notice is illegal. [*Paras.* 3 *and* 4.]

A notice under section 9 (1) of the Produce Cess Act as prescribed by rule 5 of the Rules framed under the Act should state separately the total quantity of produce consumed or oils extracted on the basis of which the cess is leviable, the amount paid and the amount due, Unless these particulars are given, the person subjected to the levy will not be able to challenge the correctness of the same if he is so advised, by filing an appeal. Where the only notice actually issued merely contained the total amount referable to the different periods by way of cess said to be payable by the petitioner is defective and cannot be sustained. [*Para.* 4.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 1st Respondent relating to the notice of demand dated 7th June, 1971, demanding payment of Rs. 26,768-75 from the petitioner for the periods 1967-68 to August, 1970 under the provisions of the Produce Cess Act XV of 1966, and quash the said order and made therein.

K. Srinivasan and *K. C. Rajappa*, for Petitioner.

Ali Mohammed and *T. Sathya Dev*, for Respondents.

The Court made the following

ORDER.—The petitioner in this writ petition is a partner of Messrs. Bharat Refineries and Oil Mills carrying on business at Erode in the manufacture and sale of groundnut oil and refined oil and he prays for the issue of a writ of *certiorari* to quash the notice of demand dated 7th June, 1971 demanding payment of Rs. 26,768-75 from the petitioner for the periods 1967-68 to August, 1970 under the provisions of the Produce Cess Act XV of 1966.

2. The Central Act XV of 1966 was enacted to provide for the imposition of cess on certain produce for the improvement and development of the methods of cultivation and marketing of such produce and for matters connected therewith. Sub-section (1) of section 3 provides for levy and collection, as a cess a duty of customs at such rate not exceeding the rate specified in the corresponding entry in column 3 of the first schedule on every produce specified in column 2 of that schedule. Sub-section (2) of that section provides for levy and collection, as a cess, on every produce specified in column 2 of the second schedule, a duty of excise at such rate, not exceeding the rate specified in the corresponding entry in column 3 thereof. Item 3 in the second schedule is, "oils extracted from oilseed crushed in any mill in India". The maximum rate at which duty of excise may be collected is one rupee per quintal of oil and the actual rate provided for in the second schedule is 60 paise per quintal of oil. Section 8 of the Act provides for every occupier of a mill furnishing to the Collector every month a return stating the total amount of produce specified in the second schedule consumed or brought under processing or extracted in the mill during the preceding month. Section 9 deals with collection of cess leviable on produce specified in the second schedule. Sub-section (1) of this section provides that on receiving any return made under section 8, the Collector shall assess the duty of excise payable on every produce specified in the second schedule, in respect of the period to which the return relates, and if the amount has not already been paid, shall cause a notice to be served upon the occupier of the mill requiring him to make payment of the amount assessed within ten days of the service of the notice. Sub-section (2) of this section deals with assessments to be made in a case where no return is furnished or the return furnished happens to be defective. That sub-section states :

"9 (2). If the occupier of any mill fails to furnish in due time the return referred to in section 8 or furnishes a return which the Collector has reason to believe is incorrect or defective, the Collector shall assess the amount payable by him in such manner, if any as may be prescribed, and the provisions of sub-section (1) shall thereupon apply as if such assessment had been made on the basis of a return furnished by the occupier";

Provided that, in the case of a return which he has reason to believe is incorrect or defective, the Collector shall not assess the duty of excise at an amount higher than that at which it is assessable on the basis of the return without giving to the occupier a reasonable opportunity of proving the correctness and completeness of the return.

Section 10 deals with the finality of assessment after providing for appeal. Sub-section (1) of this section states :

> " 10. (1) Any occupier of a mill who is aggrieved by an assessment made under section 9 may, within three months of service of notice referred to in sub-section (1) of that section, appeal to such authority as the Central Government may, by notification, in the Official Gazette, appoint in this behalf, for the cancellation or modification of the assessment and, on such appeal, the said authority may cancel or modify the assessment and order the refund to such occupier of the whole or part, as the case may be, of the amount paid thereunder:
>
> Provided that the authority so appointed shall not be inferior in rank to the Collector by whom the assessment was made."

The Produce Cess Rules, 1969, have been made under section 20 of the Act. Rule 5 of the Rules states :

> " The notice referred to in sub-section (1) of section 9 shall contain separately the total quantity of produce consumed or oils extracted, on the basis of which, the cess is leviable, the amount of cess assessed, the amount paid and the amount due and shall include a statement that in the event of the cess not being paid, action will be taken under the provisions of the Act."

According to rule 6, " where the occupier of a mill has failed to furnish the return referred to in sub-section (1) of section 8 within the time specified in sub-section (2) of that section, o has furnished within the specified period a return, which the Collector has reason to believe is incorrect or defective, the Collector shall assess the amount payable by the occupier on the basis of the monthly average amount of cess levied and collected from the said occupier in the twelve months immediately preceding the month to which the assessment relates."

3. In this case admittedly the petitioner did not submit any return except for five months, namely, April to August, 1970. However, the first respondent herein has demanded from the petitioner a sum of Rs. 26,768-75 by the impugned notice, said to be cess payable for the periods 1967-68, 1968-69 and 1969-70 and from April to August, 1970. On 26th August, 1970, summons was issued by the first respondent herein to the petitioner-mills calling upon the mills to produce (1) all registers and accounts showing the quantity of oil seeds crushed and oil produced in the petitioner's oil mills for the period from April, 1966 to August, 1970 ; and (2) all records showing payment of cess on oil by the petitioner's oil mills from April, 1966 to August, 1970. The petitioner-mills admittedly produced their accounts before the fi st respondent on 1st September, 1970 and promissed to file returns. As I have pointed out already except for five months, no return for the earlier period were filed. It is under these circumstances by a communication, dated 9th September, 1970, the first respondent called upon the petitioner-mills to pay the amount mentioned above stating that the said amounts were arrived at on the basis of the particulars furnished by the petitioner-mills as per their records. This communication also pointed out that in future the returns and payment particulars should be filed in the first respondent's office every month before 7th of the month. Subsequently not having received any payment, the first respondent sent the impugned notice dated 7th June, 1971, calling upon the petitioner to pay the amount within ten days from the date of the receipt of the demand and warning the petitioner-mills that if they failed to pay the amount as directed, action to recover the amount would be taken against them under section 12 of the Produce Cess Act, 1966. It is against this order that the present writ petition has been filed under Article 226 of the Constitution of India.

4. Mr. K. Srinivasan, learned Counsel for the petitioner, primarily contends that the mere sending of a demand notice is

not enough and that there should have been an assessment as contemplated by the Act because only if there is an order of assessment, the petitioner will be able to file an appeal as provided for under section 10 of the Act. In my opinion, the writ petition has to be allowed on a very narrow ground. I have already extracted rule 5 of the Rules providing for the form of notice contemplated by section 9 (1) of the Act which should be served on a person like the petitioner, after which alone, the petitioner could prefer an appeal. According to that rule, the notice should state separately the total quantity of produce consumed or oils extracted on the basis of which cess is leviable, the amount of cess assessed, the amount paid and the amount due. As I have pointed out already, the second schedule to the Act itself has prescribed the rate of cess and consequently the dispute, if at all, could relate only to the total quantity of produce consumed or oil extracted. Therefore, unless the notice under section 9 (1) of the Act as prescribed by rule 5 contains those particulars, the petitioner will not be in a position to challenge the correctness of the same, if he is so advised, by filing an appeal. In the present case, admittedly no notice in the form prescribed by rule 5 has been issued to the petitioner herein and the only notice which has been sent to the petitioner is one containing the total amount referable to the different periods by way of cess said to be payable by the petitioner-mills. Consequently, the notice actually issued to the petitioner does not satisfy the requirement of rule 5 and therefore cannot be sustained. On this short ground, the writ petition is allowed and the impugned demand notice issued by the first respondent is quashed. However, the allowing of this Writ Petition will not prevent the first respondent from proceeding afresh in accordance with law. There will be no order as to costs.

P.S.P. ——— *Writ petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

O. M. Jalali, S/o. Omar Mohumadu (added as L. R. in Appellate Court as per the order dated 2nd April, 1970 in I.A. No. 32 of 1970) .. *Appellant**

v.

Anusuddin, S/o. Mohaideen Abdul Kadar and others .. *Respondents.*

Mortgage—Suit for redemption—Usufructuary mortgages—Mortgagor purporting to mortgage entire property—Mortgagor entitled to moiety only—Effect—Mortgagee's heirs assigning their rights to owner of the other moiety—Effect—No extinguishment of mortgage—Assignment amounts to acknowledgment—Limitation Act (IX of 1908), *section* 19—*Assignee bound—Right to redeem subsists.*

Though a mortgagor purported to execute usufructuary mortgages in relation to the entirety of the suit property, on his being found to be entitled only to a moiety thereof, the mortgages must be taken to cover only the mortgagor's half-share. The owner of the other half-share is not a co-mortgagor but has an independent title to his half-share in the suit property. [*Para.* 7.]

On the latter obtaining an assignment of the suit mortgages from the heirs of the mortgagor, it did not operate to extinguish the mortgages as the assignee was neither a co-mortgagor nor a person entitled to redeem the mortgages. [*Para.* 8.]

The assignment of their rights by the mortgagee's heirs amounted to an acknowledgment of the subsistence of the mortgages at the time of assignment within section 19 of the Limitation Act of 1908 and such acknowledgment would bind the assignee. The assignee cannot in a suit for redemption, adopt the attitude that the mortgages are not subsisting and that they are not liable to be redeemed. [*Para.* 10.]

In view of the clear recitals in the deed of assignment, it is impossible to say that there was no acknowledgment of a sub-

*S.A. No. 457 of 1971 and Memo. of cross objections. 16*th March*, 1973.

sisting mortgage. An acknowledgment by the assignor binds the assignee as well. Therefore 'the assignee' cannot be permitted to say that she was not bound by the acknowledgment made by her assignor. The assignment was only of the mortgagee's rights. Having got an assignment of the mortgagee's right the assignee cannot now take up an attitude that the mortgages are not subsisting and they are not liable to be redeemed. [*Paras*. 7, 8 *and* 10.]

Cases referred to:—

Ayyan Ammal v. *Vellayammal*, (1956) 1 M.L.J. 255: I.L.R. (1956) Mad. 587: A.I.R. 1956 Mad. 354; *Sinnan Chetty* v. *Sivakami Ammal*, (1921) 41 M.L.J. 50: A.I.R. 1921 Mad. 326 (1); *Murajalli Humia Goundan* v. *Ramaswami Chetty*, I.L.R. (1918) 41 Mad. 650: 34 M.L.J. 528; *Padmanabha* v. *Lakshmi*, A.I.R. 1953 Tr-Co. 244; *Sankara Pillai* v. *Ananda Pillai* A.I.R. 1958 Ker. 307; *Nallathambi Nadar* v. *Ammal Nadachi*, I.L.R. (1963) Mad. 1003: (1964) 1 M.L.J. 181. A.I.R. 1964 Mad. 169; *Valliamma* v. *Sivathanu*, I.L.R. (1963) Mad. 1110: (1964) 1 M.L.J. 161: A.I.R. 1964 Mad. 269; *Sidhara Ram* v. *Gunjidin*, A.I.R. 1924 All. 458.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin in Appeal Suit No.122 of 1968 preferred against the decree of the Court of the District Munsif of Srivaikuntam in Original Suit No. 387 of 1966.

A. Ramanathan and *R. Vedantham, for* Appellant.

S. Ramasubramanian, for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant is the appellant. The suit is one for redemption of two usufructuary mortgage deeds, Exhibit B-1 dated 29th March, 1889 and Exhibit B-2 dated 30th March, 1889 for Rs. 100 and Rs. 150 respectively executed by one Ansuddin, the grandfather of the plaintiffs and the second defendant in favour of one Mohammad Noohu. The plaintiff's case is that the suit property measuring one acre and three cents belonged to their grandfather, Ansuddin, that the said Ansuddin had created the said two mortgages over that property, that the period prescribed for redemption under both the documents was one year, that there has been a partition in the family of the mortgagee, Mohammad Noohu whereunder the suit mortgages had been allotted to one Ahamad Ali Bathummal, that her father and guardian had assigned the usufructuary mortgages to the first defendant under a registered deed of assignment dated 15th June, 1911 and that since then, the first defendant as an assignee of the mortgages has been in possession and enjoyment of the suit land. The further case of the plaintiffs is that after the death of the mortgagor, Ansuddin the equity of redemption had devolved on Mohaideen Abdul Kader, the father of the plaintiffs and the second defendant and after his death on the plaintiffs and the second defendant, and that therefore, they are entitled to redeem the mortgages in question. The plaintiffs also contended that in view of the provisions of section 9-A of the Madras Agriculturists Debt Relief Act, the mortgage debts stand discharged and, therefore, they are entitled to redeem the mortgages without payment of any sum.

2. The first defendant contested the suit. She denied that the suit property originally belonged exclusively to the plaintiff's paternal grand-father, Ansuddin. It is stated that the suit land belonged to Asanachi, the mother of Ansuddin, that on her death the first defendant's father as also Ansuddin became entitled to a half share each, and that on her father's death the first defendant became entitled to a half share in the suit property. The first defendant also contended that by virtue of her redeeming the mortgage by getting an assignment from the mortgagee's legal representatives the mortgages as such have become extinguished and that, therefore, the plaintiff's remedy, if any, is to file a suit for possession within a period of 12 years from the date of assignment, that the suit for redemption as framed cannot be maintained, and that in any event, the suit for redemption is barred by time.

3. On these pleadings and on the evidence adduced on either side, the trial Court held that the suit property originally belonged to Asanachi, the mother of Ansuddin and that, therefore, the plaintiffs and the 2nd defendant on the one

hand and the first defendant on the other became entitled to a moiety in the suit properties. It also held that the assignment, Exhibit B-3 taken by the first defendant will not constitute an acknowledgment of the mortgagor's right to redeem so as to afford a fresh starting point of limitation for redemption, as alleged by the plaintiffs and that the suit for redemption having been filed more than 60 years after the date of the original mortgages is barred by limitation. In that view it dismissed the plaintiffs' suit.

4. On appeal, the lower appellate Court, practically agreed with the findings of fact arrived at by the trial Court that the suit property vested in moieties on the plaintiffs and the second defendant on the one hand and the first defendant on the other, and that the first defendant has taken an assignment of the mortgages from the mortgagee's representatives in the year 1911 by virtue of her right to a half share in the suit properties. But it did not agree with the trial Court that the suit is barred by limitation. It held that the assignment of the mortgages Exhibits B-1 and B-2 under Exhibit B-3 dated 15th June, 1911 executed by the mortgagee's legal representatives constituted an acknowledgment by the mortgagee giving a fresh period of limitation of 60 years from the date of that assignment and that, therefore, the suit is well within time. In that view the lower appellate Court decreed the suit for redemption in favour of the plaintiffs and the second defendant in respect of their undivided half share in the suit properties.

5. In this second appeal, the only question that arises for consideration is as to whether the suit for redemption is barred by limitation or not.

6. It is urged by Mr. M. S. Venkatarama Iyer, learned Counsel for the appellant, that the lower appellate Court has erroneously assumed that the amendments brought about in sections 92 and 95 of the Transfer of Property Act in 1929 were retrospective, that the true legal position before 1929 is that wherever a co-mortgagor redeems the mortgage, the mortgage gets extinguished and in its place a charge comes into existence in favour of the redeeming co-mortgagor and there is no question of the redeeming co-mortgagor being subrogated to the rights of the mortgagee whom he redeems, and that the assignment of the mortgages taken by the first defendant in his capacity as a co-mortgagor completely extinguishes the mortgages as also the right to redeem and brings in its place fresh rights and liabilities as between the first defendant and the plaintiffs. The learned Counsel refers to the decision in *Ayyan Ammal* v. *Vellayammal*[1], in support of his stand that sections 92 and 95 as amended in 1929 are not retrospective in operation and that the statutory right of subrogation conferred by section 92 on a redeeming co-mortgagor was not available in 1911 when the mortgages had been assigned to the first defendant. In that case a Full Bench of five Judges considered the question whether sections 92 and 95 as amended in 1929 were retrospective or not. It was held that the amending Act of 1929 by necessary intendment did not provide for retrospective effect being given to section 92 and 95 among other sections referred to in clause 2 of section 63 and that independently of section 63, neither expressly nor by necessary intendment section 92 or 95 or both of them taken together provide for retrospective effect being given to the statutory right of subrogation conferred by section 92 on a redeeming co-mortgagor. The Full Bench also referred to the view taken by this Court in *Sinnan Chetty* v. *Sivakami Ammal*[2] and *Murajalli Hunia Goundan* v. *Ramaswami Chetty*[3], before the amending Act of 1929 that sections 92 and 95 of the Transfer of Property Act did not confer rights of subrogation as such on a redeeming co-mortgagor. It is pointed out by the learned Counsel that as far as the suit mortgages are concerned, they came to be redeemed before 1929, under Exhibit B-3 and as such there is no question of treating the first defendant, the redeeming co-mortgagor as standing in the shoes of the mortgagee and applying the period of limitation under Article 148 of the old Limitation Act.

7. I am of the view that the question whether the amending Act of 1929 which brought about certain changes in sections

1. (1956) 1 M.L.J. 255 : I.L.R. (1956) Mad. 587 : A.I.R. 1956 Mad. 354.
2. (1921) 41 M.L.J. 501 : A.I.R. 1921 Mad. 326 (1).
3. I.L.R. (1918) 41 Mad. 650: 34 M.L.J. 528.

92 and 95 of the Transfer of Property Act is retrospective or not is not material for the decision in this case. The contention of the learned Counsel proceeds on the basis that the first defendant is co-mortgagor, that in such capacity he has redeemed the suit mortgages and that, therefore, the mortgages are not extinguished. But on the facts of this case it is clear that the mortgages have admittedly been executed only by Ansuddin who was entitled only to a half share in the suit property. The other half has been held to belong to the first defendant's father. Though Ansuddin purported to execute the mortgages in relation to the entirety of the suit property, now that it has been found that Ansuddin was entitled only to a moiety, the mortgages should be taken to cover only the mortgagor's half share. Therefore, the half share belonging to the first defendant's father cannot be the subject-matter of the suit mortgages created by Ansuddin. It is not, therefore, possible to treat the first defendant as a co-mortgagor. She has got an independent title to a half share in the suit property. Thus, when the first defendant took the assignment of the mortgages in 1911, she cannot be said to have done so in her capacity as a co-mortgagor, neither the first defendant nor her father was a co-mortgagor. If she is not a co-mortgagor, the question is whether her taking an assignment of the mortgages created by Ansuddin will put an end to the mortgages themselves. According to the learned Counsel the assignment taken by the first defendant in 1911 had extinguished the mortgages and had created new rights between the parties that it has resulted in the creation of a charge over the shares of non-redeeming co-mortgagors for the aliquot share of the mortgaged money, that there is a corresponding right created in favour of the non-redeeming co-mortgagors to claim delivery of possession by tendering the aliquot share of the mortgaged money to the redeeming co-mortgagor. The contention of the learned Counsel in substance is that a suit for redemption will not lie after the mortgages have been redeemed by a co-mortgagor and the only right of the non-redeeming co-mortgagors is to file a suit for possession. But in my view it is unnecessary to consider the tenability or otherwise of the said contention on the facts of this case. As already stated, the first defendant is not a co-mortgagor entitled to redeem the mortgages and he has taken only an assignment of the mortgages from the heirs of the original mortgagee. The question is whether the said assignment would extinguish the mortgages as such, leaving the heirs of the mortgagor to file a suit for possession within the time prescribed by law. If the assignment cannot be taken either as discharging the mortgages or as extinguishing the same, then the plaintiffs are entitled to redeem the mortgage.

8. Therefore the main question to be considered on the facts of this case is whether the assignment of the mortgages taken by the first defendant amounts to an acknowledgment under section 19 of the Limitation Act. If it is construed to be an acknowledgment of the mortgagor's right to redeem, then there will be a fresh period of limitation of 60 years from the date of the assignment for redeeming the mortgage. The learned Counsel for the appellant referred to the various decisions of this Court and other High Courts rendered before the amendment of sections 92 and 95 of the Transfer of Property Act to show that where one of several mortgagors redeems the whole mortgage and obtains possession, a suit against him by another mortgagor to recover his share of the mortgaged property on payment of his share of the expenses of redemption is not governed by Article 148 of the Limitation Act. But I am not referring to any of those decisions as in my view the first defendant is neither a co-mortgagor much less a redeeming co-mortgagor and as such the principles laid down in those decisions cannot be applied to the facts of this case. Here the first defendant who is not a co-mortgagor has taken an assignment of the mortgages which are found to comprise only the half share belonging to Ansuddin, the original mortgagor. Thus the mortgaged property is only the half share belonging to Ansuddin in the suit property though he purports to execute the mortgages in relation to the entirety of the property. The first defendant cannot be said to have any interest in the property mortgaged, that is the half share belonging to the mortgagor in the suit property. Therefore, he cannot be

said to have any right to redeem the mortgage. I cannot, therefore, agree with the learned Counsel for the appellant that the assignment taken by the first defendant amounts to a redemption of the mortgages resulting in the extinction of the same. Thus the first defendant is neither a co-mortgagor nor could he redeem the mortgages which relate only to the half share belonging to the mortgagor Ansuddin. Therefore it is clear that the mortgages as such have not been extinguished by discharge or otherwise in 1911.

9. Then we have to consider as to whether the assignment Exhibit B-3 amounts to an acknowledgment as contemplated in section 19 of the Limitation Act of 1963, so as to give a fresh period of limitation for redemption. In *Padmanabha* v. *Lakshmi*[1], there was a deed of assignment of the mortgage right. The assignee created another mortgage in respect of the same. It was held in that case that the assignment amounted to a clear admission that the mortgagee had at the relevant time only mortgage right over the property implying thereby that the property was liable to be redeemed and that such a deed of assignment of an existing mortgage right constitutes a valid acknowledgment to save limitation for a suit for redemption. In *Sankara Pillai* v. *Ananda Pillai*[2], it was held that the real nature of the transaction rather than the name given to it by the parties should decide its nature, that whether or not there is an acknowledgment is to be decided only on the recitals contained in the document, and that the acknowledgment of the subsistence of the mortgage by the mortgagee is binding on his assignee, who derives his title to the mortgage right from him and gives fresh starting point of limitation for a suit for redemption. In *Nallathambi Nadar* v. *Ammal Nadachi*[3], a Full Bench of this Court laid down the essential requirements for the purpose of invoking section 19 of the Limitation Act: (1) there should be an acknowledgment of liability in respect of the property or the right in question; and (2) it should be by the party against whom such property or right is claimed. According to the Full Bench an acknowledgment of liability pre-supposes that the person acknowledging possesses some interest which can be bound by his statement and acknowledgment of liability must involve an admission of a subsisting jural relationship between the parties and a consciousness and an intention of continuing such a relationship until it is lawfully terminated. The same Full Bench in a subsequent decision in *Valliamma* v. *Sivathanu*[1], expressed the view that in order to constitute a valid acknowledgment for purpose of limitation there should be a subsisting liability and that a mere recital of past liability accompanied by a statement as to its discharge cannot be construed as an acknowledgment of liability.

10. In this case the heirs of the mortgagee have assigned their mortgage rights under Exhibit B-3. It is clearly stated in Exhibit B-3, that what is made over under the document was the othi rights under Exhibits B-1 and B-2. In view of the clear recitals in the deed of assignment, it is impossible to say that there is no acknowledgment of a subsisting mortgage. As has been pointed out already, it is well-established that any acknowledgment by the assignor binds the assignee as well. Therefore the first defendant cannot be permitted to say that she is not bound by the acknowledgment made by her assignors. The decision in *Sidhani Ram* v. *Gangidin*[2], is also in point. In that case a mortgagee executed a sale-deed in favour of the defendant, of mortgagee rights in a grove. In that sale-deed he stated that he was a mortgagee of the grove and he was selling his rights as mortgagee to the defendant. It was held that the very fact of the mortgagee selling his mortgagee-rights amounts to an express acknowledgment of the existence of a subsisting mortgage and of his subsisting rights which he was competent to sell, that the very fact of the defendant purchasing those rights was an acceptance on his part of an existing mortgage, a mortgage which was in force as a subsisting mortgage on the date of the sale to him, and

1. A.I.R. 1953 Tr.-Co. 244.
2. A.I.R. 1958 Ker. 307.
3. I.L.R. (1963) Mad. 1003 : (1964) 1 M.L.J. 181 ; A.I.R. 1964 Mad. 169.

1. I.L.R. (1963) Mad. 1110 : (1964) 1 M.L.J. 161 : A.I.R. 1964 Mad. 269.
2. A.I.R. 1924 All. 458.

that; therefore, he cannot set up any defence inconsistent with the mortgagee's rights. In this case, the assignment deed makes it clear that the assignment was only of the mortgagee's rights. The first defendant having got an assignment of the mortgagee's rights cannot now take up an attitude that the mortgages are not subsisting and that they are not liable to be redeemed. In my view, the lower appellate Court is right in holding that the suit is not barred by limitation in view of the acknowledgment contained in Exhibit B-3.

11. The result is the second appeal fails and is dismissed with costs. No leave.

12. In the memorandum of objections filed by the respondents they question the findings of the Courts below as regards the ownership of the other half share. In view of the fact that the Courts below have concurrently held that the suit property originally belonged to Asanachi and not to Ansuddin, the finding that a half share belonged to the first defendant cannot be successfully challenged. The memorandum of objections is therefore dismissed. No costs.

P.S.P. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*M. M. Ismail and S. Natarajan, JJ.*

N. K. Saraswathi *Appellant**

v.

The Chief Educational Officer, Coimbatore and others *Respondents.*

and

Lily Isaiah *Petitioner*

v.

The Chief Educational Officer, Coimbatore and others *Respondents.*

Madras District Boards Act (XIV of 1920), *sections* 70, 199 (2) (a)—*Selections of Head-mistress—Panel Committee constituted under the Rules—Selection by Panel Committee—Appeal to Director of School Education—No provision in Rules—Whether orders passed on appeal valid.*

Once the rules did not provide for an appeal or revision, the original order was intended to be final and could not be interfered with by the so-called exercise of powers of administrative superintendence and in the words of the Full Bench in *K. Nagaratnammal* v. *S. Ibrahim Saheb and another*, (1955) 2 M.L.J. 49: A.I.R. 1955 Mad. 305) such order would be the first and final order. [*Para.* 3.]

Case referred to :—

K. Nagaratnammal v. *S. Ibrahim Saheb and another*, (1955) 2 M.L.J. 49: I.L.R. (1955) Mad 460 : A.I.R. 1955 Mad. 305.

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ramaprasada Rao, dated 3rd April, 1972 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 85 of 1972 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the second respondent in his proceedings R.C. 92280/G-4-70 dated 21st October, 1971 and the consequential proceedings R.C. 80-52/71 dated 29th October, 1971 and quash the said order, passed thereon; and Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the first respondent herein dated 24th July, 1972 and made in R.O.P. No. 186-81/71 and quash the same.

K. Alagiriswami, for Appellant in W.A. No. 347 of 1972.

S. Balathandapani, for Respondent in W.A. No. 347 of 1972.

S. Balathandapani and *Nalini Chidambaram*, for Petitioner in W.P. No. 2066 of 1972.

K. Alagiriswami and The Government Pleader, for Respondent in W.P. No. 2066 of 1972.

The Judgment of the Court was delivered by

Ismail, J.—*W. A. No.* 347 *of* 1972.—The writ appeal is directed against the order of Ramaprasada Rao, J., dated 3rd April, 1972 in W.P. No. 85 of 1972. The petitioner therein is the

* W.A. No. 347 of 1972 and W.P. No. 2066 of 1972. *25th July,* 1973.

appellant herein. The facts are not in controversy. The appellant herein and the third respondent belong to the District Board Educational Service as Assistants in schools. According to the practice followed with reference to the rules that have been framed by the Government pursuant to sections 70 and 199 (2) (*a*) of the Madras District Boards Act, 1920 for each year, on the basis of the vacancies that are likely to arise in the post of Headmistresses, a panel would be constituted by a Panel Committee consisting of the President of the District Board and the Inspectress of Schools. After the abolition of the District Boards in the place of the President, it was the Chief Educational Officer, who was functioning and therefore the Panel Committee consisted of the Chief Educational Officer and the Inspectress of Schools. Admittedly the petitioner (appellant herein) entered the service of the District Board on 4th August, 1962, while the third respondent entered the service of the District Board on 1st July, 1964. For the year 1965-66, four vacancies of Headmistresses arose and the Panel Committee duly selected one Tirumathi Sitalakshmi and three others. For the year 1966-67, there was no selection by the Panel Committee. For the year 1967-68, the Panel Committee, though it was obliged to select two, selected only one. For the year 1962-63 there was no selection and for the year 1969-70, two persons one Thirumathi Vedavalli and the appellant herein were selected to constitute the Panel by the Panel Committee on 17th March, 1970. Against the proceedings of the Panel Committee, the third respondent herein preferred an appeal to the Director of School Education, Madras, contending that she ought to have been included in the Panel for the year 1965-66 itself and notwithstanding this even for the year 1969-70, her name was not included in the Panel. The Director of School Education, by his order dated 21st October, 1971, held that the third respondent should have been included in the Panel for the year 1965-66 itself and that justice has been denied to her by not including her name even for the year 1969-70. Consequently he gave a direction to the Chief Educational Officer to revise the Panel and include the name of the third respondent, Tirumathi Lily Isaiah, in the Panel for 1969-70 and give her rank No. 1. He also directed the Chief Educational Officer to give a posting to the third respondent immediately and intimate the same to him. Pursuant to this order of the Director of School Education, the Panel Committee on 29th October, 1971 revised the original Panel and included the name of the third respondent herein and assigned her the first rank. The result of that was that the third respondent was appointed as a Headmistress and the appellant herein who was by that time appointed as Headmistress was reverted as an Assistant. Aggrieved by these proceedings, the appellant herein filed W.P. No. 85 of 1972 on the file of this Court and prayed for the issue of a writ of *certiorari* to quash the order dated 21st October, 1971 of the Director of School Education and the consequent proceedings of the Panel Committee, represented by the Chief Educational Officer, Coimbatore, dated 29th October, 1971. This Writ Petition came up for hearing before Ramaprasada Rao, J. Before the learned Judge, on behalf of the appellant two arguments were principally advanced in support of the writ petition. The first was that the Director of School Education violated the principles of natural justice, when he passed the order dated 21st October, 1971 without giving any opportunity whatever to the appellant herein, who was really aggrieved by his order as well as the consequential order dated 29th October, 1971 of the Panel Committee. The second argument was that the rules did not provide for any appeal to the Director of School Education against the orders of the Panel Committee and consequently the Director of School Education had no jurisdiction whatever to interfere with the Panel constituted by the Panel Committee. The learned Judge accepted the first argument advanced on behalf of the appellant and held that the order of the Director of School Education dated 21st October, 1971 was vitiated inasmuch as the same was passed in violation of the principles of natural justice. As far as the second argument was concerned, the learned Judge negatived the same. In the view of the learned Judge, the fact that the rules did not provide for any appeal did not take away the power or authority of the administrative Head of the Department to consider the correctness of the orders passed by the

Panel Committee and consequently the Director of School Education was entitled to entertain the appeal preferred by the third respondent herein and interfere with the Panel prepared by the Panel Committee on the representation of the third respondent. Even though the learned Judge rejected the contention of the appellant on the second point, in view of his conclusion on the first point, he allowed the writ petition and quashed the impugned orders. The learned Judge however pointed out towards the end of his judgment:

> "It is open to the Panel Committee of the District to consider the relative claims of the petitioner and the third respondent as also the other members who were inducted in the Panel for the year 1969-70 and prepare the Panel in accordance with law after hearing the parties before them and those who are likely to be affected thereunder".

As against this order of Ramaprasada Rao, J., the third respondent herein preferred W.A. No. 144 of 1972 and that writ appeal was dismissed at the stage of admission by a Bench of this Court, to which one of us was a party. It is thereafter the present appeal has been preferred by the petitioner in the writ petition.

2. After the writ petition was allowed by this Court, the Panel Committee passed a fresh order on 24th July, 1972. The order reads as follows:

> "This office proceedings Rc. No. 51-S1/70, dated 29th October, 1971 reconstitution the Panel for 1969-70 with the following names is hereby cancelled.
>
> A list nil
>
> B list 1. Tmt. Lily Isaiah
>
> 2. Tmt. S. Vedavalli
>
> 3. Tmt. N. K. Saraswathi
>
> 2. The original Panel drawn on 17th March, 1 70 for 1969-70 with the following names stand(s).
>
> ( ) Tmt. S. Vedavalli (2) Tmt. N. K. Saraswathi".

It is to quash this order, W.P. No. 2066 of 1972 has been preferred by the third respondent in this appeal, W.A. No. 347 of 1972.

3. Mr. K. Alagiriswami, learned Counsel for the appellant, contends that in so far as the matter is covered and regulated by statutory rules and in so far as those rules do not provide for any appeal against orders of the Panel Committee, the Director of School Education could not claim to exercise any administrative power with reference to such matters and consequently the appeal preferred by the third respondent to the Director of School Education was incompetent and the order passed by the Director of School Education was totally without jurisdiction. In support of this contention, the learned Counsel relied on a decision of a Full Bench of this Court in *K. Nagaratnammal* v. *S. Ibrahim Saheb and another*[1]. In that judgment, the Full Bench of this Court has held:

> "Where a statute takes over and occupies a field previously not regulated by legislation, the rights and powers conferred and the obligations imposed by the statute must be worked out within the statutory framework. If a statute confers a particular right and prescribes a particular mode for its enforcement, enforcement of the right must be sought in that mode. If it is to be enforced by a suit, then a suit must be filed; if it is to be vindicated by an appeal, then an appeal must be preferred to the specified authority. If no appeal is provided for but only a right of revision, then that remedy must be sought in aid. Conversely, if no appeal or revision is provided for, then the order of the original authority cannot be interfered with and that order would be the first and final Order."

An argument similar to the one which found favour with Ramaprasada Rao, J., namely, an administrative superior in the exercise of his power of superintendence can scrutinise the orders passed by a subordinate authority was advanced before the Full Bench. The argument as referred to by the Full Bench itself is in the following terms:

> "All the administrative and executive acts of any authority under the Government are subject to the overall control of the Government; the power of the

1. I.L.R. (1955) Mad. 460: (1955) 2 M.L.J. 49: A.I.R. 1955 Mad. 305.

> Government to interfere and revise the orders of those subordinate authorities is derived from the power of the Government to govern. Where the power exercised by the authorities subordinate to the Government may be described as judicial or quasi-judicial process, Government may not have power to intervene. But where it is not of such a nature but is purely administrative in character, the Government have power to interfere".

The Full Bench rejected this argument also. The Full Bench pointed out:

> "The contention is opposed to what seems to us to be a sound rule, that where the statute has made provision in respect of particular matters, it is to the statute that we must look for the determination of the rights of individuals and not to the vague and indefinite background of the overall powers of the Government".

In this particular case, as we have pointed out already, the proceedings were said to be taken by the panel committee pursuant to the rules framed by the Government under sections 70 and 199 (2) (*a*) of the Madras District Boards Act, 1920. Admittedly those rules do not provide for any appeal against the orders of the panel committee to the Director of School Education. Consequently, the only question that arises for considerations is, whether, notwithstanding the absence of any provision for appeal, the Director of School Education has any power to entertain an appeal against the orders of the panel committee. The decision of the Full Bench to which we have drawn attention already is a complete answer to this question. According to the judgment of the Full Bench, once the matter is governed and regulated by statutory provisions or the rules made thereunder, there is no scope for the exercise of any power of administrative superintendence outside the provisions of the Act or the rules. Once the rules do not provide for an appeal or revision, the original order is intended to be final and cannot be interfered with by the so-called exercise of powers of administrative superintendence and in the words of the Full Bench, such order would be the first and final order. In view of this Full Bench judgment, Mr. K. K. Venugopal, learned Counsel for the third respondent, could not sustain the conclusion of the learned Judge in this behalf.

4. On the other hand, Mr. K. K. Venugopal sought to attempt a fresh argument. According to him, the District Boards came to an end on 2nd October, 1961 and the District Board schools were taken over and managed by the Collector till 1963 and thereafter they became regular Government schools and consequently the rules referred to above, namely, the rules framed under the Madras District Boards Act, 1920, have no application and therefore we must proceed on the basis that there are no rules at all governing the matter in question. We are unable to accept this argument for the simple reason that the entire proceedings before the learned Judge as well as the case of the parties even in W.P. No. 2066 of 1972 have been rested only on the rules framed by the Government under the statutory provisions of the Madras District Boards Act, 1920, referred to already. Consequently, we are unable to entertain this argument for the first time and we hold that the learned Judge erred in coming to the conclusion that the Director of School Education in the exercise of general powers of superintendence could entertain an appeal at the instance of the third respondent against the order of the panel committee constituting the panel for the year 1969-70.

5. The result is, the writ appeal is allowed and the orders impugned in W.P. No. 85 of 1972 will stand quashed *in toto* on the ground that the former order was without jurisdiction and the latter one based upon the former one also will have no validity.

6. *Writ Petition No.* 2066 *of* 1972.—As far as this writ petition is concerned, we have already extracted the order sought to be quashed. The result of the order of the learned Judge in W.P. No. 85 of 1972 as well as the order in the above writ appeal will be that the order dated 21st October, 1971 of the Director of School Education and the order dated 29th October, 1971 of the panel committee cease to exist. If so, the original order dated 17th March, 1970 of the panel committee constituting a panel consisting of Tirumathi Vedavalli and the appellant in W.A. No. 347 of

1972 will stand. In the impugned order, the panel committee has just preserved this position. We have extracted the impugned order already. That order cancels the order passed by the panel committee on 29th October, 1971, consequent upon the order of the Director of School Education dated 21st October, 1971, and restores its original order dated 17th March, 1970 constituting a panel for 1969-70 comprising of Tirumathi S. Vedavalli and the appellant in W.A. No. 347 of 1972. Though this order was really superfluous, because that was the result of the orders of this Court quashing the order of the Director of School Education dated 21st October, 1971 and the consequential order of the panel committee dated 29th October, 1971, on the ground of superfluity, it is not necessary to quash the said order.

7. However, Mr. K. K. Venugopal, learned Counsel for the petitioner, put forward two arguments in support of his contention that this order has to be quashed. One is, Ramaprasada Rao, J., in his observations in the judgment in W.P. No. 85 of 1972, directed the panel committee to constitute a panel afresh, after giving an opportunity to all the parties concerned and that procedure has not been followed. The second is, the impugned order was passed only by the Chief Educational Officer and not by the panel committee consisting of the Chief Educational Officer and the Inspectress of Schools.

8. As far as the first argument is concerned, we are unable to hold that Ramaprasada Rao, J., in his judgment in W.P. No. 85 of 1972 gave a direction to the panel committee to go into the panel for 1969-70 afresh after giving an opportunity to all the parties concerned. Expressly the learned Judge's order quashed the order of the Director of School Education dated 21st October, 1971 and the order of the panel committee dated 29th October, 1971. The learned Judge did not either expressly or by implication interfere with the order dated 17th March, 1970 of the panel committee, namely the original order. We may also point out that the learned Judge could not have interfered with that order, because Tirumathi Vedavalli, who was one of the persons included in the panel and who was ranked as No. 1, was not a party in W.P. No. 85 of 1972 and consequently she had no opportunity of putting forward her case in support of that order of the panel committee. Therefore, all that the learned Judge should have intended to do when he made the observations extracted above, was to point out that the Director of School Education will be at liberty to go into the matter afresh, because the learned Judge had quashed the order only on the ground that he had passed the order without giving an opportunity to the appellant in the writ appeal and had held that the Director of School Education had jurisdiction to entertain the appeal and deal with the same. But we have held that, the Director of School Education had no such jurisdiction. Consequently, in our opinion, the observations made by the learned Judge in his judgment in W.P. No. 85 of 1972 which we have extracted already, cannot be given effect to, in view of our conclusion in the writ appeal.

9. As far as the second argument is concerned, no such case has been put forward at any stage so far and in all these proceedings, the parties have proceeded on the basis that the orders were passed only by the panel committee consisting of the Chief Educational Officer and the Inspectress of Schools and not exclusively by the Chief Educational Officer. Even in the affidavit filed in support of W.P. No. 2066 of 1972, no such case has been put forward and therefore the respondents had no opportunity of explaining the position with reference to any such allegation and consequently we are not able to entertain such an argument at this stage.

10. The result is, the writ petition fails and is dismissed. We make it absolutely clear that we do not express any opinion on the merits as to the correctness or otherwise of the panel prepared by the panel committee originally on 17th March, 1970 for the year 1969-1970.

11. There will be no order as to costs either in the writ appeal or in the writ petition.

S.J. ——— *Appeal allowed.*
Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam* and *N. S. Ramaswami, JJ.*

Anthony Servai .. *Appellant**

v.

Pethi Naicker and others *Respondents.*

Anthony Servai .. *Appellant*

v.

Kulandama Naicker (*died*) **and others** .. *Respondents*

and

Narayana Konar and others .. *Appellants*

v.

Shanmughasundarathammal .. *Respondent.*

Hindu Succession Act (*XXX of* 1956), *sections* 6, 8—*Suit for recovery of possession—Female limited owner alienating property—Act XXX of* 1956 *coming into force after alienation—Death of female limited owner—Succession to property—"Male Hindu dying intestate"—Meaning of—Scope of section* 8—*Prospective and not retrospective.*

Though a Hindu last male-holder's physical death was on a particular date, for the purpose of determining the order of succession fictionally he would be deemed to have died only on the date on which the intervening limited owner died. Therefore, to apply section 8 (of Act XXX of 1956) to a case where the physical death of the last male-holder happened prior to the commencement of the Act, it is wholly unnecessary to construe section 8 as retrospective in character. In such a case because of the fiction referred to above, the term "male Hindu dying intestate" occurring in section 8 would have reference only to the date on which the limited owner died. In other words, in such a case, the male Hindu died intestate only on the date on which the limited owner died. [*Para.* 19.]

Succession to a male Hindu was a matter undoubtedly provided for in the Act (XXX of 1956). Hence the old textual Hindu law could not be looked into for ascertaining the reversionary heirs of the male Hindu to whose estate succession opened after the commencement of the Act, merely because the physical death of the man had occurred prior to the commencement of the Act. [*Paras.* 20 *and* 21.]

Difficulty arises where a female Hindu taking as a limited owner the estate of a male who dies prior to the commencement of the Act (XXX of 1956), alienates the estate (prior to the commencement of the Act) and dies subsequent to the commencement of the Act. To such a case section 14 of the Act is not applicable because the property is not possessed by the female Hindu as contemplated under that section. Succession to the estate no doubt opens on the date on which she dies, but the property remains that of the last male holder who died prior to the commencement of the Act, inasmuch as the female Hindu who held only a limited estate in the property was not possessed of the same at the commencement of the Act. Therefore succession is to be traced to the last male holder as if he died on the date on which the limited owner died, even though the physical death of the last male holder had occurred very much prior to the commencement of the Act. [*Para.* 24.]

When the Legislature codified the law of succession relating to Hindus dying intestate, it was not possible to say that they intended that the old textual Hindu law would apply in a case where the succession opened very much after the commencement of the Act. That in a case where a limited owner intervened, succession to the estate of the last male holder opened on the date on which the limited owner died, would not be disputed. [*Para.* 25.]

In a case where a Hindu coparcener died intestate after the commencement of the Act leaving a female relative specified in Class I of the Schedule, etc., his interest in the coparcenary would not devolve by survivorship (though it would have so devolved but for the coming into force

*S.A. Nos. 1076 and 1088 of 1970 and L.P.A. No. 6 of 1972. *2nd May*, 1973.

of the Act) but as per the provisions contained in section 8 of the Act. To the extent section 8 is linked with section 6, one has to look to section 8, but there would be no *vice versa*. In other words, to determine the meaning of the expression "a male Hindu dying intestate" occurring in section 8, section 6 is not to be tacked on. [*Para.* 27.]

The expression "a male Hindu dying intestate" would relate to the date of the physical death of the man, only if on that date the succession to his estate finally opened and not to a case where a limited owner intervenes and keeps the reversionary succession in abeyance as it were. [*Para.* 28.]

In holding that section 8 would be applicable to a case of a male Hindu whose physical death occurred prior to the Act but succession to his estate opened after the commencement of the Act, the Court was not giving retrospective effect to section 8 as the material point of time was the date when the succession opened, *viz.*, the death of the female Hindu who intervened. [*Para.* 30.]

Cases referred to :—

Sampath Kumari v. *Lakshmi Ammal*, I.L.R. (1962) Mad. 832: (1962) 2 M.L.J. 464: A.I.R. 1963 Mad. 50; *Erramma* v. *Veerupana*, A.I.R. 1966 S.C. 1879: (1966) 2 S.C.R. 626: (1967) 1 S.C.J. 746; *Fateh Bibi* v. *Charandas*, (1970) 2 S.C.J. 629 : (1970) 2 An.W.R. (S.C.) 116: (1970) 2 M.L.J. (S.C.) 116: A.I.R. 1970 S.C. 789; *Duni Chand* v. *Mst. Anarkali*, (1946) 2 M.L.J. 290; 73 I.A. 187: A.I.R. 1946 P.C. 173; *Kempiah* v. *Girigamma*, A.I.R. 1966 Mys. 189; *Chaturbhuj Pradan* v. *Sarbeshwar Vardah*, A.I.R. 1967 Pat. 138; *Jondebi* v. *Upendra Sahu*, A.I.R. 1968 Orissa 187 ; *Bepin Behari* v. *Smt. Lakshmosona Dassi*, A.I.R. 1959 Cal. 27; *Ratan Kumari* v. *Sundarlal*, A.I.R. 1959 Cal. 787; *Mt. Tare* v. *Darshan Singh*, A.I.R. 1960 Punj. 145; *Ramulu* v. *Narayana*, A.I.R 1965 A.P. 466: (1965) 2 An.W.R. 111; *Harbhaj* v. *Mohan Singh*, A.I.R. 1967 Punj. 184; *Satyanarayana* v. *Seetamma*, A.I.R. 1972 Mys. 247; *Lachman* v. *Thunia*, A.I.R. 1972 H.P. 62; *Shanmughasundarathammal* v. *Narayana Konar*, 85 L.W. 678: (1972) 2 M.L.J. 336; *Renuka Bala* v. *Aswini Kumar*, A.I.R. 1961 Pat. 498.

S.A. Nos. 1076 *and* 1088 *of* 1970.

Appeals against the decree of the Court of the Subordinate Judge, Dindigul in Appeal Suit Nos. 162 and 172 of 1967 preferred against the decree of the Court of the District Munsif of Dindigul in Original Suit No. 308 of 1965.

L.P.A. No. 6 *of* 1972.

Appeal under clause 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Ramanujam dated 17th December, 1971 in S.A. No. 1439 of 1969 preferred against the decree of the Court of the Subordinate Judge, Tuticorin in A.S. No. 14 of 1968.

R. Desikachari, S. Krishnamurthy, R. Gopalakrishnan, K. Alagumalai, A.C. Thevar and *S. Rabindranath*, for Appellant.

K. Sarvabhauman and *R. Nandakumar*, for Respondents.

The Court delivered the following

JUDGMENT:—These two Second Appeals arise out of O.S. No. 308 of 1965 filed by the plaintiffs claiming to be the nearest reversioners to the estate of one Pethi Naicker, a minor, who died in or about 1944. On the death of the limited owner (mother on 8th February, 1965) who succeeded the last male holder (the minor) in 1944 the reversion opened and the plaintiffs have sought to recover possession from the defendants of the *A* to *H* schedule properties. The main question to be considered is whether section 8 of Act XXX of 1956 is applicable to a case where a limited owner who having parted with possession of the properties of the last male holder inherited by her before the coming into force of Act XXX of 1956, died after the coming into force of the Act. In order to appreciate the contentions raised, it is necessary to set out briefly the facts, which are as follows.

2. The suit properties originally belonged to Appi Naicker, who died in or about 1942 leaving behind him his only son Pethi Naicker, a minor, who also died in or about 1944 and was succeeded by his mother Pappammal, who was in possession and enjoyment of the same till she alienated the same in 1949 in favour of her nearest relations and died in 1965. The plaintiffs as reversioners

filed a declaratory suit (O.S.No. 335 of 1949) against Pappammal and the aliences contending that the said alienations are not binding on the reversioners and the said suit was decreed on 13th September, 1950, the Court holding that the said alienations are not valid after the lifetime of Pappammal. The said Pappammal died on 8th February, 1965 and on her death the plaintiffs as the nearest reversioners to the estate of the last male holder, Pethi Naicker (minor) have filed the present suit for recovery of possession of the suit properties.

3. The first defendant, who is the alienee, contested the suit on the ground that the sale deed in his favour is true, valid and fully supported by consideration, that he is not bound by the decree in O.S. No. 335 of 1949 to which he was not a party, that in any event he had spent Rs. 2,500 in making the suit properties fit for garden cultivation, that he has converted them into nanja lands, that he has further dug a well in the *A* schedule properties and put up stone construction, that the houses constructed were worth about Rs. 1,000, that he had also put up a granite stone embankment at a cost of Rs. 600, that he had acquired title to the *A* schedule by adverse possession, that the suit was barred by limitation and that the plaintiffs were not entitled to recover possession without paying costs of the improvements effected.

4. Defendants 3 and 4 contended that Pappammal had othied *C* schedule properties to the third defendant and the *D* schedule properties to the fourth defendant, that they are in possession of the said properties as othidars and that the othi debts not having been discharged by Pappammal, the plaintiffs are not entitled to possession without redemption.

5. Defendants 2 and 5 remained *ex parte*. The sixth defendant filed a written statement contending that the plaintiffs are not the nearest reversioners, that she is the daughter of Venkattammal, the sister of late Pethi Naicker (senior), that Pappammal became the absolute owner of the properties of late minor Pethi Naicker by virtue of section 14 of Act XXX of 1956, that she alone is the heir, who is entitled to the suit properties by virtue of section 15 of the said Act, that Pappammal had also devised the suit property in her favour under the registered will dated 2nd December, 1964, and that the decision in O.S. No. 335 of 1946 is not binding on her in view of Act XXX of 1956.

6. The plaintiffs filed a reply statement contending that the first defendant purchased the *A* schedule properties with knowledge of the decree in O.S. No. 335 of 1949 and in spite of the objections of the plaintiffs and their notice, that the deepening of the well was done after the issue of the plaintiffs' objections, the cost of which could not have exceeded Rs. 50, that he has not levelled up the lands, that the othi deeds have been brought about by the alienees under the sale deed dated 7th September, 1959, that Pappammal had no interest in the suit properties at the time when the Hindu Succession Act XXX of 1956 came into force, that the sixth defendant is not the heir and not entitled to the suit properties and that the alleged will in favour of the sixth defendant is not valid.

7. The trial Court decreed the suit and directed the plaintiffs to pay Rs. 3,750 being the value of improvements effected by the first defendant and permitted the first defendant to remove the superstructures put up by him.

8. Aggrieved by the said judgment and decree the plaintiffs as well as the first defendant filed A.S. No. 162 of 1967 and 172 of 1967 to the Sub-Court, Dindigul. Two questions arose for determination in both the appeals. They were (1) whether the plaintiffs are the reversioners to the estate of Pethi Naicker as on the date of death of Pappammal and (2) whether the first defendant is entitled to the cost of improvements effected by him and if so to what amount?

9. The learned Judge relying on the decision in *Sampath Kumari* v. *Lakshmi Ammal*[1], and *Erramma* v. *Veerupana*[2], held that the plaintiffs, are the reversioners to the estate of Pethi Naicker, and are entitled to succeed on the death of Pappammal, (the limited owner) with

1. I.L.R. (1962) Mad. 832 : (1962) 2 M.L.J. 464 : A.I.R. 1963 Mad. 50.
2. A.I.R. 1966 S.C. 1879 ; (1966) 2 S.C.R. 626 ; (1967) 1 S.C.J. 746.

reference to the law that was prevalent prior to the enactment of Act XXX of 1956 and not the sixth defendant who would be the heir only if the heirship is to be traced under Act XXX of 1956. On the question of improvements the appellate Court held that the first defendant would not be entitled to the cost of improvements as he had effected such improvements only after being put on notice by the plaintiffs of his defective title. In the result A.S. No. 162 of 1967 was allowed and A.S. No. 172 of 1967 was dismissed. The above two second appeals are filed by the first defendant.

10. The question that arises for consideration in the above Second Appeals is whether succession on the death of a limited owner, who has parted with the property to which she succeeded before the coming into force of the Hindu Succession Act, but who died after the Act had come into force, is governed by section 8 of the Act or whether the Hindu Law prevailing prior to the coming into force of the Act, will apply. It is the common case that the limited owner did not die possessed of any property to which section 14 of the Act would be applicable. It is also the common case that the plaintiffs are the nearest heirs of the last male-holder, the succession to whose property opened on the death of the limited owner and that if section 8 is applicable, the plaintiffs will be nowhere.

11. It may be seen that under the old Hindu Law, when a limited owner who succeeds to the estate of the last male holder dies, succession opens on her death, but succession is traceable to the last male holder, and the fiction is that the last male holder who actually died long ago is deemed to die simultaneously with the limited owner. The said fiction is applicable only for the purpose ascertaining who the nearest reversioners are on the date of death of the limited owner. In other words, the fictional date of death of the last male holder and not his actual date of death is the basis for ascertainment as to who the reversioners of the estate of the last male holder are. In this connection section 4 (*b*) of the Hindu Succession Act, which was referred to by Venkataraman, J., in *Sambathkumari* v. *Lakshmi Ammal and others*[1] has a material bearing, the importance of which has been lost sight of in several decisions taking the opposite view. But for the recent judgment of the Supreme Court in *Fateh Bibi* v. *Chanrandas*[2], arising under the Central Act II of 1929 where a similar language as that in section 8 of the Succession Act is employed, this question should be taken to have been finally decided in *Erramma* v. *Veerupana*[3]. But as Ramanujam, J. has applied the latest decision of the Supreme Court to a case arising under the Hindu Succession Act, it has become necessary to consider the question as to which of the judgments of the Supreme Court have to be followed. It is in this view I have considered the question at some length. Before dealing with the case-law on the point it is necessary to set out the material portion of section 8 of the Central Act XXX of 1956, which runs as follows:—

> "The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter".

The Act came into operation on 17th June, 1956, on which date it received the assent of the President. The language of section 8 has to be contrasted with the language used in sections 6 and 7 of the Act. While sections 6 and 7 use the words "when a male Hindu dies after the commencement of the Act", section 8 is singularly silent on this matter. Apart from the different language used in that section, there is nothing in the section itself to indicate the intention of giving a retrospective operation and according to the well recognised canons of construction every provision is prospective unless there is an express or implied intention to give it a retrospective effect. So far as this Court is concerned a Division Bench consisting of Ganapatia Pillai and Venkataraman, JJ., in *Sambathkumari* v. *Lakshmi Ammal and others*[1], considered this question. Ganapatia Pillai, J., at page 52 explained certain of the observations made by the Privy Council in *Duni*

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1. (1962) 2 M.L.J. 464: I.L.R. (1962) Mad. 832 : A.I.R. 1963 Mad. 50.
116 (1970) 2 S.C.J. 629: (1970) 2 An.W.R.(S.C) S.C: (1970) 2 M.L.J. (S.C.) 116 : A.I.R. 1970
2.. 789.
3. (1967) 1 S.C.J. 746: A.I.R. 1966 S.C. 1879.

Chand v. *Mst. Anarkali*[1], and held that having regard to the fundamental principle that succession is never is abeyance, the estate must vest in some heir as soon as the owner of the estate dies that " the estate in the present case "vested the two widows of Muthuswami Chettiar the last maleholder". The learned Judge made the following observations at page 53:

"It is only for the limited purpose of ascertaining the reversionary heirs that a fiction has been created by which the deceased person is deemed to have lived up to the date of the death of the female heir who immediately succeeds him.

It is well-known that a fiction in law cannot be relied upon for any purpose other than the limited purpose for which law has sanctioned the creation of such fiction".

The learned Judge ultimately came to the conclusion that section 8 is not retrospective and is inapplicable to the case on hand.

12. The other learned Judge, Venkataraman, J., dealt with this question more fully from pages 61 and referred to the various decisions on the point and ultimately came to the conclusion that section 8 is not retrospective. Various other High Courts took the same view. For example *Kempiah* v. *Girigamma*[2], *Chaturbhuj Pradan* v. *Sarbeshwar Vardah*[3] and *Jondebi* v. *Upendra Sahu*[4]. This question came up for consideration before the Supreme Court in *Eramma* v. *Veerupana*[5], Ramaswami, J., who delivered the judgment on behalf of the Bench observed at page 1881 as follows:—

"There is nothing in the language of this section to suggest that it has retrospective operation. The words "The property of a male Hindu dying intestate" and the words "shall devolve" occurring in the section make it very clear that the property whose devolution is provided for by that section must be the property of a person who dies after the commencement of the Hindu Succession Act. Reference may be made, in this connection, to section 6 of the Act which states:

"When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that if the deceased had left him surviving a femle relative specified in class I of the schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession as the case may be, under this Act and not by survivorship.

It is clear from the express language of the section that it applies only to coparcenary property of the male Hindu holder who dies after the commencement of the Act. It is manifest that the language of section 8 must be construed in the context of section 6 of the Act. We accordingly hold that the provisions of section 8 of the Hindu Succession Act are not retrospective in operation and where a male Hindu died before the Act came into force *i.e.*, where succession opened before the Act, section 8 of the Act will have no application".

13. On the other line there are a few decisions commencing from *Bopin Behari* v. *Smt. Lakshmosona Dassi*[1], taking the opposite view *viz.*, that the Act is retrospective, that is to say, that section 8 of the Act will apply to such cases and I shall briefly refer to a few of them: *Ratan Kumari* v. *Sundarlal*[2], *Mt. Taro* v. *Darshan Singh*[3], *Ramulu* v. *Narayana*[4] and *Harbhaj* v. *Mohan Singh*[5]. I may observe that the leramed Judges in *Harbhaj* v. *Mohan Singh case*[5], decided after the decision of the above Supreme Court case did not refer

1. (1946) 2 M.L.J. 290 : 73 I.A. 187 : A.I.R 1946 P.C. 173.
2. A.I.R. 1966 Mys. 189.
3. A.I.R. 1967 Pat. 138.
4. A.I.R. 1968 Orissa 187.
5. (1966) 2 S.C.R. 626 : (1967) 1 S.C.J. 746 : A.I.R. 1966 S.C. 1879.

1. A.I.R. 1959 Cal. 27.
2. A.I.R. 1959 Cal. 787.
3. A.I.R. 1960 Punj. 145.
4. A.I.R. 1965 A.P. 466: (1965) 2 An.W.R. 111.
5. A.I.R. 1967 Punj. 184.

to the decision of the Supreme Court in *Eramma* v. *Veerupana*[1]. Similarly in *Satyanarayana* v. *Sitamma*[2], the learned Judge without referring to *Eramma* v. *Veerupana*[1], came to the same conclusion. Recently a Full Bench of the Himachal Pradesh High Court in *Lachman* v. *Thunia*[3], has without referring to either of the two Supreme Court decisions referred to above come to the same conclusion.

14. As already stated, the Supreme Court has finally expressed in *Eramma* v. *Veerupana*[1], that section 8 is only prospective. However, the Supreme Court in *Fateh Bibi* v. *Charandas*[4], had occasion to consider a similar languge in the Hindu Law of Inheritance (Amendment Act 1929). The question which arose in the case was whether the Hindu Law of Inheritance (Amendment Act, 1929) applied only to a case of a Hindu female dying intestate on or after 21st February, 1929 (when the Act came into force) or whether it applied to a case of a Hindu male dying intestate before the Act came into operation and succeeded by a female heir who died after that date. Vaidialingam, J., who delivered the Judgment of the Court in construing the 1929 Act, the langugae of which is similar to the language employed in section 8 of the Hindu Succession Act, held that the Act applied also to the case of a Hindu male dying intestate before the Act came into operation and is succeeded by a female heir who died after the Act came into force. The learned Judge relied on the decision of the Prviy Council in *Lala Duni Chand* v. *Mt. Anar Kali*[5], wherein the words "dying intestate" was interpreted as descriptive of the status of the deceased and having no reference to the time of the death of the prepositus. The learned Judge, however, did not refer to *Eramma* v. *Veerupana*[1], rendered under section 8 of the Hindu Succession Act but came to the opposite conclusion. Ramanujam, J., in *Shanmughasundarathammal* v. *Narayana Konar and others*[1], applied the latest decision of the Supreme Court to a case arising under section 8 of the Hindu Succession Act and held that section 8 is prospective in operation and that the plaintiff, who was the one most nearly related to Sudalaimuthu, the last male holder at the time of the death of Somu Ammal, became entitled to the suit properties, (the date of the actual death of the last male holder not being relevant). The Supreme Court having fully considered the question whether section 8 is retrospective or not in *Eramma* v. *Veerupana*[2], the question now arises as to how far the said decision has been affected by *Fateh Bibi* v. *Charandas*[3]. That is a matter which requires consideration. Ramanujam, J., however, granted leave in the second appeal decided by him and I understand that an appeal has been filed against that Judgment. The question raised is of considerable importance and likely to recur frequently and an early authoritative determination of this question is desirable. I, therefore, consider that this is a fit matter to be decided by a Division Bench. The papers may, therefore, be placed before my Lord, the Chief Justice, for posting the appeal before a Division Bench. The Letters Patent Appeal against the Judgment in *Shanmughasundarathammal* v. *Narayana Konar and others*[1], may also be posted along with this appeal.

On the second appeals coming before the Division Bench consisting of Kailasam and N. S. Ramaswami, JJ.

The Judgment of the Court was delivered by

N. S. Ramaswami, J.—The question that arises in the two Second Appeals and the Letters Patent Appeal is one and the same, *viz.*, whether the provisions of the Hindu Succession Act (XXX of 1956), hereinafter referred to as the Act, or the textual Hindu Law, which was in force prior to the coming into force of the Act, have to be applied for determining the reversioners in a case where the last male

1. (1966) 2 S.C.R. 626: (1967) 1 S.C.J. 746: A.I.R. 1966 S.C. 1879.
2. A.I.R. 1972 Mys. 247.
3. A.I.R. 1972 H.P. 62.
4. (1970) 2 S.C.J. 629 : (1970) 2 An.W.R. (S.C.) 116 : (1970) 2 M.L.J. (S.C.) 116 : A.I.R. 1970 S.C. 789.
5. (1946) 2 M.L.J. 290 : 74 I.A. 187 : A.I.R. 1946 P.C. 173.

1. 85 L.W. 678 : (1972) 2 M.L.J. 336.
2. (1966) 2 S.C.R. 626: (1967) 1 S.C.J. 746: A.I.R. 1966 S.C. 1879.
3. (1970) 2 An.W.R. (S.C.) 116: (1970) 2 M.L.J. (S.C.) 116: (1970) 2 S.C.J. 629 : A.I.R. 1970 S.C. 789.
4. (1972) 2 M.L.J. 336 : 85 L.W. 678.

prior to the coming into force of the Act, died after the coming into force of the Act.

16. The two second appeals arise out of Original Suit No. 308 of 1965 on the file of the Court of District Munsif, Dindigul, which is one filed by the two plaintiffs in that suit as reversioners of one Pethi Naicker, a minor, who died in the year 1944, for the recovery of possession of the properties of the said Pethi. On Pethi's death in the year 1944, his mother Pappammal succeeded to his estate as a limited owner and she alienated the several items of suit properties. The property described in the *A* schedule to the plaint has been sold to the 1st defendant in the case. Other items had been alienated in favour of defendants 2 to 5, but we are not concerned with those items in the second appeals. Pappammal died on 8th February, 1965. As far as *A* Schedule property is concerned, the 1st defendant, the alienee, *inter alia* contended that Pappammal having died after the Act came into force, the reversioners of Pethi, the last male holder, should be determined as per the provisions of the Act and not in accordance with the textual Hindu Law which was in vogue prior to the coming into force of the Act and that under the provisions of the Act, the two plaintiffs would not be the nearest reversioners of the last male holder as on the date of the death of Pappammal, the limited owner. Muthammal, impleaded as the 6th defendant, is the last male holder's sister's daughter who would be a class II heir as per the provisions of the Act. The two plaintiffs are the son's sons of one Kolandama Naicker who is the brother of the paternal great-grandfather of the last male holder. If the provisions of the Act are applicable, admittedly the plaintiffs would be owners in the picture. The 1st defendant further contended that in any event, he should be paid the monies spent by him for improving the property before he is dispossessed of the property. The trial Court found in favour of the plaintiffs regarding the question whether they are entitled to possession of the property, but held that the plaintiffs are bound to pay a sum of Rs. 3,750 to the 1st defendant towards improvements carried out by him, before getting possession. The plaintiffs filed A. S. No. 162 of 1967 on the file of the Court of Subordinate Judge, Dindigul, against that portion of the decree of the trial Court which was against them viz., the direction to the plaintiffs to pay a sum of Rs. 3,750 to the 1st defendant as a condition precedent to get possession of the property. The 1st defendant filed A.S. No. 172 of 1967 on the file of the same court challenging the decision of the trial Court that the plaintiffs are entitled to possession of the property. The two appeals were heard together by the learned Subordinate Judge, Dindigul and he concurred with the view of the trial Court that the plaintiffs are entitled to possession. Both the Courts found that the reversioners entitled to get the estate of the last male holder are to be determined only as per the textual Hindu Law which was in vogue prior to the coming into force of the Act and not under the provisions of the Act. The first appellate Court further found that the 1st defendant is not entitled to claim the value of the improvements carried out by him. Therefore the first appellate Court allowed A.S. No. 162 of 1967 filed by the plaintiffs and dismissed A.S. No. 172 of 1967 filed by the 1st defendant. The two second appeals are by the lst defendant, Second appeal No. 1076 of 1970 being against the dismissal of A.S. No. 122 of 1967 by the first appellate Court and Second Appeal No. 1088 of 1970 being against A.S. No. 162 of 1967 which has been allowed by the first appellate Court.

17. The two second appeals came up before Raghavan, J. and the learned Judge, after referring to a number of decisions and particularly to two decisions of the Supreme Court one in *Eramma* v. *Veeruppana*[1] and the other in *Fateh Bibi* v. *Charandas*[2], made a reference that the two second appeals be posted before a Division Bench for the decision of the question whether section 8 of the Act would be applicable in the case of a male Hindu whose physical death occurred prior to the coming into force of the Act, but the limited owner alienating the estate prior to the coming into force of the Act died after the coming into force of the Act. The learned Judge felt that

1. (1967) 1 S.C.J. 746: A.I.R. 1966 S.C. 1879.
2. (1970) 2 S.C.J. 629: A.I.R. 1970 S.C. 789.

there was conflict of opinion regarding this question in the two decisions of the Supreme Court referred to above and that is why the reference has been made.

18. Letters Patent Appeal No. 6 of 1972 arises out of a different matter turning on a similar question. That is against the decision of Ramanujam, J., in Second Appeal No. 1439 of 1969 which is reported in *Shanmughasundarathammal* v. *Narayana Konar*[1]. There the learned Judge found that in view of the decision of the Supreme Court in *Fateh Bibi* v. *Charandas*[2], section 8 of the Act would be applicable even in a case of a male Hindu whose physical death occurred prior to the coming into force of the Act, provided the limited owner, who got the estate and alienated the same before the coming into force of the Act, died after the commencement of the Act. As the question that arises in the two second Appeals as well as in the Letters Patent Appeal is one and the same, they were heard together.

19. In the two second appeals, admittedly the two plaintiffs would be the nearest reversioners of the last male holder Pethi (who died as a minor in the year 1944), if the textual Hindu Law is applied. Similarly, if the provisions of the Act are applicable, then the 6th defendant, who is the last male holder's sister's daughter, would be the nearest reversioner as she is one of the Class II heirs under the Act who get precedence over agnates. Section 4 (1) of the Act is as follows:

> "Save as otherwise expressly provided in this Act—
>
> (*a*) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
>
> (*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act".

Section 8 of the Act relates to the general rules of succession in the case of males and it is as follows:

> "The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:
>
> (*a*) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
>
> (*b*) Secondly, if there is no heir of Class I, then upon the heirs, being the relatives in class II of the schedule;
>
> (*c*) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
>
> (*d*) lastly, if there is no agnate, then upon the cognates of the deceased".

Whether section 8 is applicable in the case of the estate of Pethi, the last male holder, is the question. We are quite clear that it does. In holding so, we do not say for a moment that section 8 is retrospective in character. It is true that minor Pethi died long prior to the coming into force of the Act. But his mother Pappammal intervened as a limited owner and she died only in the year 1965 after the coming into force of the Act. The succession to the estate of minor Pethi. undoubtedly opened on 8th February, 1965, the date on which Pappammal, the limited owner, died. It is settled law that even though the last male holder's physical death is on a particular date, for the purpose of determining the order of succession fictionally he would be deemed to have died only on the date on which the intervening limited owner dies. Therefore, to apply section 8 to a case where the physical death of the last male holder happened prior to the commencement of the Act but succession to his estate opened only after the commencement of the Act (as in the present case), it is wholly unnecessary to construe section 8 as retrospective in character. Because of the fiction referred above, the term "male Hindu dying intestate" occurring in section 8 would, in the case of the male Hindu dying prior to the commencement of the Act but succession to his estate opening after the commencement of the Act, have reference only to the date on which the limited owner dies. In other

1. (1972) 2 M.L.J. 336 : 85 L.W. 678.
2. (1970) 2 S.C.J. 629 : A.I.R. 1970 S.C. 789.

words, in such a case, the male Hindu dies intestate only on the date on which the limited owner dies.

20. The Act is a codifying law relating to intestate succession among Hindus. Section 4 of the Act says that the law relating to succession among Hindus that was in force prior to the commencement of the Act shall cease to have effect in respect of matters for which provision has been made in the Act. Succession to a male Hindu is a matter undoubtedly provided for in the Act. That being so, we are unable to see how the old textual Hindu Law can be looked into for ascertaining the reversionary heirs of a male Hindu regarding whose estate succession opens after the commencement of the Act, merely because the physical death of the man had occurred prior to the commencement of the Act.

21. The question whether section 8 would apply to a case where the physical death of a male Hindu occurs prior to the commencement of the Act, arises only where a limited owner takes the estate, alienates the same prior to the commencement of the Act and dies subsequent to the commencement of the Act. In cases where no limited owner takes the estate on the death of the last male holder, the estate vests in the nearest heir of the last male holder and the Act, which came into force on a subsequent date, would have no application at all to such an estate. The legislation must be taken to be only prospective in character unless there are clear words in the statute to make any particular provision to have retrospective operation. In cases where a Hindu male died intestate prior to the commencement of the Act and there was no limited owner taking the estate, the same would have gone to his heirs according to the rules of succession then in force. The estate having thus vested in such heir or heirs, they cannot be divested of the estate, even though, under the statute which comes into force subsequently, they would not be the nearest heirs of the said last male holder. Section 8 of the Act is certainly not meant to be applied to a case where the estate has already vested in a full owner as per the rules of succession which were in force prior to the commencement of the Act.

22. Similarly, if the estate left by a male Hindu who dies prior to the commencement of the Act happened to be an interest in coparcenary property and that interest had passed on to other members of the coparcenary by survivorship, such estate would not be affected in any way by the provisions of the Act. Section 6 of the Act, which deals with devolution of interest in coparcenary property, specifically says that the provision applied to a case of a male Hindu dying after the commencement of the Act. That is so because the provisions are not meant to have retrospective operation, affecting estates which had already vested in accordance with the rules of Hindu Law which were in force prior to the commencement of the Act.

23. What happens in a case where a female Hindu takes the estate as a limited owner on the death of the last male holder prior to the commencement of the Act? If the estate continued to be in the possession of such a female Hindu till the date on which the Act came into force, by virtue of section 14 (1) of the Act the limited estate would get enlarged to an absolute estate, for section 14 (1) of the Act says that any property in possession of a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. In such a case, when the female Hindu, who became the absolute owner of the estate, dies subsequently, she would be the stock of descent and succession has to be traced to her.

24. The difficulty arises only in a case where a female Hindu becomes a limited owner in respect of the estate of a male who dies prior to the commencement of the Act, then the limited owner, alienates the estate (prior to the commencement of the Act) and dies subsequent to the commencement of the Act. To such a case section 14 of the Act is not applicable because the property is not possessed by the female Hindu as contemplated under that section. When, in such a case, the female Hindu dies after the commencement of the Act, undoubtedly succession to the estate opens on the date on which she dies. It must be remembered that the property remains that of the

last male holder who died prior to the commencement of the Act, as the female Hindu who got the property held only a limited estate in the same and it never got enlarged into an absolute estate, as the female Hindu was not possessed of the property after the commencement of the Act, the same having been sold away prior to the commencement of the Act. Therefore succession is to be traced to the last male holder as if he died on the date on which the limited owner died, even though the physical death of the last male holder had occurred very much prior to the commencement of the Act. That is the situation in the present case.

25. The property in question had been alienated to the 1st defendant by Pappammal, the limited owner, prior to the commencement of the Act, but she died only on 8th February, 1965. The reversionary heirs of minor Pethi as on that date, viz., 8th February, 1965, have to be determined because of the fiction that the last male Hindu should be deemed to have died intestate only on the date on which the limited owner died. Therefore taking section 8 to be only prospective in character, we do not see why the provisions of that section are not to be applied in the case. If the textual Hindu Law has to be applied to the present case in order to find out the nearest reversioners, then it would, in our opinion, amount to making the intention of the legislature nugatory. When the legislature codified the law of succession relating to Hindus dying intestate, it is not possible to say that they intended that the old textual Hindu Law would apply in a case where the succession opens very much after the commencement of the Act as in the present case. That in a case where a limited owner intervenes, succession to the estate of the last male holder opens on the date on which the limited owner dies, cannot be disputed. In the present case, the suit has been filed only on the basis that succession has opened on 8th February, 1965, the date on which Pappammal, the limited owner, died. But in spite of succession so opening very much after the commencement of the Act, the plaintiffs want the Court not to apply section 8 of the Act to determine who the nearest reversioners are and they want the old textual Hindu Law to be applied. We are quite clear that that is not possible.

26. It must be taken to be settled law that the expression "a Hindu male dying intestate" need not necessarily relate to the date of the physical death of the man and that it would relate to the date of the fictional death of the man in cases where a limited owner intervenes.

27. It is contended that a reading of sections 6 and 8 of the Act together would show that section 8 would be applicable only to a case where a male Hindu physically dies after the commencement of the Act. Section 6 of the Act relates to devolution of interest in coparcenary property. The section re-enacts the old textual Hindu Law that the interest of a Hindu in a Mitakshara coparcenary property shall devolve by survivorship upon the surviving members of the coparcenary. But there is a proviso to the section which says that if the male Hindu, who dies after the commencement of the Act, had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, his interest in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship (Explanation I to the section says the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not). Therefore in a case where a Hindu coparcener dies intestate after the commencement of the Act leaving a female relative specified in Class I of the Schedule, etc. his interest in the coparcenary would not devolve by survivorship (though it would have so devolved but for the coming into force of the Act) but as per the provisions contained in section 8 of the Act. To this extent section 8 is linked with section 6. But the question is whether, because of the above link between the two sections, one can hold that section 8 would apply only to a case where the physical death of a male Hindu occurs after the com-

mencement of the Act. We do not think so. It must be remembered that section 6 relates only to devolution of interest in coparcenary property and to no other property. As far as such interest in coparcenary property is concerned, the Act applied only if the male Hindu died after the commencement of the Act. That is so because if a coparcener had died prior to the commencement of the Act, his interest in the coparcenery would have already devolved by the law of survivorship on the remaining coparceners and the same would have vested in them and the Act is not meant to divest persons of estates which had already vested in them. But section 8 does not relate only to interest in coparcenary property but it relates to separate property of a male Hindu as well. In fact, under Explanation I to section 6, the interest in coparcenary property of a male Hindu dying intestate is deemed to be his share in the coparcenary property in case a partition had been effected as on the date on which he died. That is for the purpose of applying the rule of succession contained in section 8 to the interest of a coparcener who dies intestate. But as we said, section 8 is not intended to cover only cases contemplated under section 6 of the Act, for while section 6 relates only to devolution of interest in coparcenary property, section 8 operates on a wider field. Therefore, though while determining the devolution of interest in coparcenary property under section 6, one has to look to section 8, there would be no *vice-versa*. In other words, to determine the meaning of the expression "a male Hindu dying intestate" occurring in section 8, section 6 is not to be tacked on.

28. In *Duni Chand* v. *Anar Kali*[1], the Judicial Committee had to consider this question, *viz.*, the meaning of the expression "a Hindu male dying intestate", though it was under the Hindu Law of Inheritance (Amendment) Act, 1929. That was a case where the physical death of the Hindu male happened before the coming into force of the 1929 Act. He was succeeded by a female heir who died after the Act came into operation. The Judicial Committee held that in that case

1. (1946) 2 M.L.J. 290 : 73 I.A. 187 : A.I.R. 1946 P.C. 173.

the succession to the estate opened out on the death of the female heir and hence the 1929 Act would apply to the case and an heir under the said Act would be entitled to succeed. Their Lordships pointed out that there is no vesting as at the date of the death of the last full owner and the question of who is the nearest heir or what is the class of reversionary heirs, falls to be settled at the date of the expiry of the ownership for life. It was also pointed out that during the lifetime of the female limited owner, reversionary right is a mere possibility or *spes successionis* and that it cannot be predicated who would be the nearest reversioner at the time of her death. Even though this decision is under the 1929 Act, the principle is the same. The question in both the cases is whether the expression "a Hindu male dying intestate" has reference only to the date of the physical death of the man or it would refer to the date of the fictional death, viz., the date on which the limited owner died. This decision of the Judicial Committee has been approved by the Supreme Court in *Fateh Bibi* v. *Charan Dass*[1]. That is also a case under the 1929 Act. But we think after the above decision of the Supreme Court it would not be open to contend that the expression "a Hindu made dying intestate" should have reference only to the date of the physical death of the man even in a case where a limited owner intervenes and succession opens after the commencement of the Act. As a matter of fact, we are of the opinion that the principle laid down by the Privy Council and approved by the Supreme Court in the above case would apply *a fortiori* to the present case. It must be remembered that the Hindu Law of Inheritance (Amendment) Act, 1929 was not a codifying law. It only altered the order of succession of certain persons mentioned therein. When even under that Act it is held that the expression "a male Hindu dying intestate" should be taken to have reference to the date on which the limited owner dies and succession opens, in the present case, which is under the Act which is a codifying law relating to intestate succession among Hindus, it would be incongruous to say that even though succession opens very

1. (1970) 2 S.C.J. 629: A.I.R. 1970 S.C. 789.

much after the commencement of the Act, still one has to look to the old textual Hindu Law to determine the reversionary heirs, taking the expression "a male Hindu dying intestate" as having reference only to the date of physical death of the man. We are quite clear that that expression would relate to the date of the physical death of the man, only if on that date the succession to his estate finally opened and not to a case where a limited owner intervenes and keeps the reversionary succession in abeyance as it were.

29. Reliance is placed on behalf of the plaintiffs on the decision of the Supreme Court in *Eramma* v. *Veerupana*[1], which is a case arising under the Act itself. It is also contended that the view expressed in *Fateh Bibi v. Charan Dass*[2], is in conflict with the view in the earlier case of the Supreme Court, viz., *Eramma* v. *Veerupana*[1], and that the earlier case being one under the Act while the other case is under the 1929 Act, as far as this case is concerned, the earlier decision of the Supreme Court has to be followed. We are of the opinion that there is really no conflict between the two decisions of the Supreme Court, and the earlier decision of the Supreme Court, though under the Act, does not in any way help the plaintiffs in the present case. That was a case where the last male holder by name Basanna died in 1936-37, (*i.e.,*) prior to the commencement of the Act. The said Basanna was the son of one Eran Gowda who had married three wives by name Eramma, Siddamma and Sharnamma; Basanna was the son through Sharnamma. On his death, his two stepmothers, *viz.*, Eramma and Siddamma, who had absolutely no right in his estate, had trespassed into the estate and continued to be in possession of the same. (Sharnamma, the mother of Basanna, seems to have predeceased him.) The reversioners who were entitled to the estate of Basanna filed a suit to recover possession of the estate. The two step-mothers of Basanna set up a case that each one of them had adopted a son to their late husband Eran Gowda and therefore the plaintiffs in that suit cannot recover possession. The case of adoption set up by the two step-mothers was negatived by the High Court and in the case of one of the step mothers leave had been granted to appeal to the Supreme Court. In respect of the other, leave had been refused by the High Court and a special leave application had been filed in the Supreme Court by her. When those proceedings were so pending in the Supreme Court, the Act (Hindu Succession Act, 1956) came into force. The plaintiffs in that suit having obtained a decree for possession, executed the decree. Then Eramma, one of the step-mothers of Basanna, contended that the decree became non-executable in view of the provisions of the Act as under section 14 of the Act she had become the full owner of the property that was in her possession. This contention was negatived by the High Court and affirmed by the Supreme Court holding that section 14 of the Act would have no application in that case because Eramma was in possession of the property only as a trespasser and not as a limited owner thereof. When Eran Gowda, the father of Basanna, died the Hindu Women's Rights to Property Act was not in force and therefore Eramma and Siddamma had absolutely no right in the estate of Basanna. Section 14 would apply only if a female Hindu is possessed of property, whether acquired before or after the commencement of the Act. Their Lordships of the Supreme Court pointed out that possession contemplated under that section is lawful possession and not possession as a trespasser.

30. It had been further contended on behalf of Eramma, one of the step-mothers of Basanna, that section 8 of the Act is retrospective in character and that therefore it applied even to the estate of Basanna who died as early as 1936-37. That contention was negatived and their Lordships held that the provisions of section 8 of the Act are not retrospective in operation and where a male Hindu died before the Act came into force, section 8 of the Act will have no application. It must be remembered that in that case no limited owner intervened and the succession did not open after the commencement of the Act. Admittedly in the case before the Supreme Court

1. (1967) 1 S.C.J. 746 : A.I.R. 1966 S.C. 1879.
2. (1970) 2 S.C.J. 629: A.I.R. 1970 S.C. 789.

the estate did not pass on to any limited owner on the death of Basanna in 1936-37. The succession to his estate had opened even in 1936-37. It is under those circumstances it was held by the Supreme Court that Section 8 of the Act would not be applicable to that case. As a matter of fact, their Lordships specifically point out that section 8 of the Act would not be applicable where succession opened before the Act. The observation of the Supreme Court is as follows:

> "We accordingly hold that the provisions of section 8 of the Hindu Succession Act are not retrospective in operation and where a male Hindu died before the Act came into force, (*i.e.*) where succession opened before the Act, section 8 of the Act will have no application".

Even the above observation can be interpreted as impliedly approving of the position that where succession opened after the commencement of the Act (whatever be the date on which the last male holder physically died), Section 8 would be applicable. Anyway, in that case their Lordships of the Supreme Court did not say that section 8 would not be applicable even if succession opened after the commencement of the Act, though the male Hindu died prior to the Act. Therefore this decision is in no way conflicting with the decision of the Privy Council in *Duni Chand* v. *Anar Kali*[1], and that of the Supreme Court in *Fateh Bibi* v. *Charan Dass*[2], which are cases specifically dealing with the question of succession opening after the commencement of the Act, even though the male Hindu died before the Act. As pointed out by the Privy Council and the Supreme Court, in holding that section 8 would be applicable to a case of a male Hindu whose physical death occurred prior to the Act but succession to his estate opened after the commencement of the Act, we are not giving retrospective effect to section 8 as the material point of time is the date when the succession opens, *viz.*, the death of the female Hindu who intervened.

1. (1946) 2 M.L.J. 290 : A.I.R. 1946 P.C. 173.
2. (1970) 2 S.C.J. 629 ; A.I.R. 1970 S.C. 789.

31. In *Sampath Kumari* v. *Lakshmi Ammal*[1] a Division Bench of this Court has observed that when a male Hindu dies intestate leaving a female heir like a widow or a daughter to succeed him under the law in force prior to the commencement of the Act, it is not correct to say that succession to the estate of the male does not open until the death of the intervening female heir. It was further observed that the widow is not a mere life-estate holder and having regard to the fundamental principle that succession is never in abeyance, the estate of the male Hindu must vest in some heir as soon as he dies. In that particular case, the estate so vested in the two widows of the last male holder, that was a case of the male Hindu dying prior to the commencement of the Act leaving two widows and a daughter. As per the provisions of the Hindu Women's Rights to Property Act, the two widows succeeded to the estate of the male Hindu and as they were in possession of the estate on the date on which the Act came into force; by virtue of section 14 of the Act the limited estate became enlarged to one of absolute estate in their hands. But the daughter of the last male Hindu wanted a share in the estate on the ground that section 8 of the Act is retrospective in operation and that it applied to the estate even though her father died prior to the commencement of the Act. The above contention of the daughter was, if we may say so with respect, rightly rejected by Ganapatia Pillai and Venkataraman, JJ. who constituted the Division Bench of this Court. As we have already pointed out, section 8 is really not retrospective in operation and it would not apply to a case of a male Hindu who died prior to the Act, unless succession to his estate opened out after the commencement of the Act. It is needless to stress that by applying section 8 to a case where succession opened after the commencement of the Act (though the last male holder had died prior to the Act), we are not giving any retrospective effect to that section, for the material date is the date on which the succession opened.

32. The observations of the Division Bench in *Sampath Kumari* v. *Lakshmi*

1. I.L.R. (1962) Mad. 832 : 75 L.W. 639 ; (1962) 2 M.L.J. 464 ; A.I.R. 1963 Mad. 50.

Ammal[1], that succession opened in that case ever on the date of physical death of the male Hindu and that the estate vested in his widows, should be understood on the facts of that case. Those observations do not cover the question as to when succession opens as far as the reversioners are concerned. It is true the widow or any other female heir who took a limited estate under the old textual law did succeed to the estate, but that succession is certainly not as full owner. It may be that the widow who so succeeds would be competent to validly liquidate the estate under certain circumstances. But what happens if the estate is available to be taken by the reversioners on the date of the death of the widow, is the question. Undoubtedly, on such date succession to the estate of the last male Hindu opens but as far as the reversioners are concerned, if the female Hindu had alienated the property prior to the commencement of the Act, but such alienation is not binding on the reversioners, succession to the estate (which still remains to be that of the last male Hindu) does open out on the death of the female Hindu. That is what has happened in the present case. It cannot be contended and, as a matter of fact, it is not contended that the succession to the estate of minor Pethi did not open out on 8th February, 1965, the date on which Pappammal, his mother, died. The vesting of the estate in the female heir as soon as the make propositus dies, as observed by the above Division Bench, is certianly not an absolute vesting. The female heir does succeed to the estate of the male Hindu, but certainly not as full owner under the old textual Hindu Law. In the case before the Division Bench, the daughter was not entitled to a share in the estate of her father, not because the estate had absolutely vested in another before the commencement of the Act, but really because succession to the estate did not open after the commencement of the Act. It must be remembered that the widows of the last male Hindu who had taken over his estate prior to the Act were alive on the date of the commencement of the Act, so much so section 14 came into operation and converted the limited estate into an absolute estate. In such a case, naturally the daughter cannot rely upon section 8 of the Act and claim a share in the estate for the simple reason that no succession opened after the commencement of the Act. Therefore the observations of the Division Bench in *Sampath Kumari* v. *Lakshmi Ammal*[1], are in no way inconsistent with the conclusion which we have reached in this case.

1. (1962) 2 M.L.J. 464: I.L.R. (1962) Mad. 832 ; 75 L.W. 639 : A.I.R. 1963 Mad. 50.

33. The Calcutta High Court in *Bepin Behary* v. *Sm. Lakshasona Dassi*[2], and *Ratan Kumari* v. *Sunder Lal*[3], has taken a similar view as we now take regarding application of section 8 of the Act. The Punjab High Court has also taken the same view in *M.S.T. Taro* v. *Darshan Singh*[4] and *Harbhaj* v. *Mohan Singh*[5]. The Andhra Pradesh High Court in *Ramulu* v. *Narayana*[6], the Mysore High Court in *Satyanarayana* v. *Seethamma*[7], and a Full Bench of the Himachal Pradesh High Court in *Lachhman* v. *Thunia*[8], have also taken the same view. But the Patna High Court in *Renuka Bala* v. *Aswini Kumar*[9], and *Chaturbhuj Pradhan* v. *Sarbeshwar Pradhan*[10], the Mysore High Court in *Kempiah* v. *Girigamma*[11], and the Orissa High Court in *Jandebi* v. *Upendra Sahu*[12], have taken a different view. But we are of the opinion that the above decisions taking a contrary view cannot be accepted in view of the decision of the Supreme Court in *Fateh Bibi* v. *Charandas*[13].

33. The Orissa High Court, in the case referred to above, has observed that the death of a male Hindu after commencement of the Act refers to actual and not fictional death, purporting to follow *Eramma* v. *Veerupana*[14]. But the above decision of

1. (1962) 2 M.L.J. 464 : I.L.R. (1962) Mad. 832 : 75 L.W. 639 : A.I.R. 1963 Mad. 50.
2. A.I.R. 1959 Cal. 27.
3. A.I.R. 1959 Cal. 787.
4. A.I.R. 1960 Punj. 145.
5. A.I.R. 1967 Punj. 184.
6. A.I.R. 1965 A..P. 466 : (1965) 2 An.W.R. 111.
7. A.I.R. 1972 Mys. 247.
8. A.I.R. 1972 Him. Pra. 69.
9. A.I.R. 1961 Pat. 498.
10. A.I.R. 1967 Pat. 138.
11. A.I.R. 1966 Mys. 189.
12. A.I.R. 1968 Orissa 187.
13. (1970) 2 S.C.J. 629: A..I.R. 1970 S.C. 789.
14. (1967) 1 S.C.J. 746 : A.I.R. 1966 S.C. 1879.

the Supreme Court did not deal with the question of fictional death. As already seen, that was a case where succession did not open after the commencement of the Act inasmuch as no limited owner intervened.

34. The Patna High Court and the Mysore High Court seem to think that applying section 8 to a case like the present one (where the limited owner alienated the property prior to the Act and died after the Act, thereby succession to the last male Hindu opening after the Act) would amount to giving retrospective operation to section 8. The Mysore High Court has also been critical of the decision of the Judicial Committee in *Duni Chand* v. *Anar Kali*[1]. As the Supreme Court in *Fatech Bibi* v. *Charan Dass*[2], has approved the decision of the Privy Council, the view of the Mysore High Court cannot be followed. With respect to the learned Judges of the Mysore High Court as well as the Patna High Court, we are unable to agree with their view.

35. In the present case (the two second appeals), the plaintiffs, who are agnates of the last male Hindu (minor Pethi) removed by several degrees, cannot have any claim to his estate in preference to the 6th defendant who is the last male holder's sister's daughter. She is a Class II heir under section 8 of the Act. Therefore Second Appeal No. 1076 of 1970 has to be allowed. However, Second Appeal No. 1088 of 1970 has to be dismissed because the question of the 1st defendant getting the value of improvements does not arise as the plaintiffs are not entitled to possession of the property.

36. The facts in the Letters Patent Appeal are as follows:

The last male holder is one Sudalaimuthu. He had two brothers by name Enamuthu and Shanmugam. The father of the last male holder is also Sudalaimuthu and he has to be referred to as Sudalaimuthu No. I and the last male holder has to be referred to as Sudalaimuthu No. II. Somu Ammal is the widow of Sudalaimuthu No. II, (the last male holder) who succeeded to the estate in the year 1919 on the death of her husband. The widow Somu Ammal sold the property in the year 1935 to the 1st defendant in the case by name Narayana Konar. Thereupon Enamuthu and Shanmugam, the two brothers of Sudalaimuthu No. II (last male holder), filed a suit (O.S. No. 275 of 1935) for a declaration that the alienation was not binding on the reversioners after the death of Somu Ammal. That suit had been decreed. Somu Ammal died on 22nd March, 1966.

37. The Letters Patent Appeal arises out of O.S. No. 299 of 1966 filed by Shanmugasundarathammal, the plaintiff, who claims to be the nearest reversioner entitled to succeed to the estate of Sudalaimuthu No. II. She is the son's daughter of Shanmugam, one of the brothers of Sudalaimuthu No. II. In the suit, the alienee from Somu Ammal was impleaded as the 1st defendant. His brother's son, who was in possession of the property, was impleaded as the 2nd defendant and the brother of the 2nd defendant, who claimed to have been adopted by Somu Ammal and thereby became entitled to the property, was impleaded as the 3rd defendant. The Courts below concurrently found against the case of adoption set up by the 3rd defendant. The trial Court decreed the suit holding that the plaintiff is the nearest reversioner, but the first appellate Court reversed the finding. Ramanujam, J. allowed the second appeal filed by the plaintiff and the decision is reported in (*Shanmughasundarathammal* v. *Narayana Konar*)[1]. It is not disputed that if the provisions of section 8 of the Act are applicable, the plaintiff would be the nearest reversioner entitled to the property and if it is not applicable and the old textual Hindu Law has to be applied in order to determine the nearest reversioners, the plaintiff has to be non-suited. Mookandi and Palavesam are the sons of two different paternal uncles of the last male holder Sudalaimuthu No. II. The last male holder's father is also Sudalaimuthu No. I and Mookandi is the son of one brother of Sudalaimuthu No. I and Palavesam is the son of another brother of the said Sudalaimuthu No. I. If

1. (1946) 2 M.L.J. 290: A.I.R. 1946 P.C. 173.
2. (1970) 2 S.C.J. 629: A.I.R. 1970 S.C. 789.

1. (1972) 2 M.L.J. 336 : 85 L.W. 678.

the textual Hindu Law is to be applied, the said Mookandi and Palavesam, who are still alive, would get precedence over the plaintiff. But as we agree with Ramanujam, J. that section 8 of the Act would be applicable even though the last male holder died as early as 1919, as succession opened out only after the coming into force of the Act, the plaintiff should succeed. Under rule 1 of section 12 of the Act, among agnates, the one who has fewer or no degrees of ascent has to be preferred. Mookandi and Palavesam, as well as the plaintiff, are agnates of the last male holder. But the plaintiff has fewer degrees of ascent than Mookandi and Palavesam (The plaintiff is the last male holder's father's son's grand-daughter. Mookandi and Palavesam are the last male holder's father's father's son's sons). Therefore the Letters Patent Appeal has to be dismissed.

38. The result is, Second Appeal No. 1076 of 1970 is allowed and Second Appeal No. 1088 of 1970 is dismissed. Parties to bear their respective costs throughout. The Letters Patent Appeal is dismissed with costs.

S.J. ——— *S.A. No.* 1076 *allowed.*
S.A. No. 1088 *dismissed.*
L. P. A. dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

Thirumathi Ramayammal and others .. *Appellants**

v.

Thirumathi Muthammal and another .. *Respondents.*

Hindu Law—Family arrangement—Requirements—Beneficiaries—Should be related to each other and have some possible claim.

Hindu Marriage Act (XXV of 1955), *sections* 11 *and* 16*—Scope—Neither spouse obtaining declaration of nullity under section* 11 *—Status of children of marriage—Effect of successful challenge of validity of marriage by third party in other proceedings—Children illegitimate.*

A party who takes a benefit under a family settlement need not necessarily be shown to have, under the law, a share in the property. It is enough to show that the parties are related to each other in some way and have a possible claim to the property or even a semblance of claim on some ground or other. [*Para.* 9.]

Where no decree of nullity has been granted at the instance of either spouse under section 11, Hindu Marriage Act, the provisions of section 16 of the Act cannot apply and if a third party successfully challenges the validity of the marriage in other proceedings on the ground that it is void by operation of section 11, the children of such a marriage would still be illegitimate. [*Para.* 10.]

The wording of section 16 of the Hindu Marriage Act in so far as it is relevant to a marriage void under section 11, leads to an anomalous and startling position which could not have been contemplated by the Legislature. The position and status of children of void marriage should obviously be the same whether the marriage is declared a nullity under section 11 or otherwise. Though the language of the section is more appropriate to voidable marriages, it has been applied to void marriages as well, presumably with the object of ensuring that where a marriage is in fact solemnised but was void for any of the reasons mentioned in section 11, the children of such marriage should not be bastardised whether a decree of nullity is passed or not. But this obvious intention of the Legislature has not been carried out. The section is so plain and unambiguous and it would be straining the language beyond permissible limits to say that children born of void marriages are legitimate even in cases where a decree of nullity had not been granted. It is not possible for the Court to construe the same in a different manner having in mind the presumed intention of the Legislature even if it appears to be obvious. This is a *casus omissus* which the Courts connot reach for no canon of construction will permit the Court to supply what is clearly a lacuna in the statute and it is for the Legislature to set right the matter by a suitable amendment of the section. [*Para.* 10.]

*S.A. No. 989 of 1971. *9th August,* 1973.

Cases referred to :—

Tek Behadur Bhujil v. *Debi Singh Bhujil*, (1966) 2 S.C.J. 290 : A.I.R. 1966 S.C. 292 ; *Rangaswami Goundan* v. *Nachiappa Goundan*, I.L.R. 42 Mad. 523 : 46 I.A. 72 : 36 M.L.J. 493 : A.I.R. 1918 P.C. 196 ; *Ram Charan* v. *Girija Nandini*, (1966) 1 S.C.J. 61 : (1965) 3 S.C.R. 841 : A.I.R 1966 S.C. 323 ; *Gouri Ammal* v. *Thulasi Ammal*, 75 L.W. 559 : A.I.R. 1962 Mad. 510.

Appeal against the decree of the Court of the Subordinate Judge, Dindigul in Appeal Suit No. 48 of 1969 preferred against the decree of the Court of the District Munsif of Dindigul in Original Suit No. 72 of 1967.

K. Sarvabhawman and *T. R. Mani*, for Appellant.

A. Sundaram Iyer, for *Gandhi*, for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 1, 3 and 4 in O.S. No. 72 of 1967 on the file of the District Munsiff, Dindigul, are the appellants. The first and second plaintiffs in the suit, claiming to be the third wife and daughter respectively of the second defendant, filed the suit for declaration of their title to the suit properties and for a permanent injunction restraining the appellants from interfering with their possession and enjoyment of the same. They claim title to the suit properties on the basis of a family arrangement said to have been entered into and evidenced by Exhibit A-1 dated 25th May, 1964, between the second defendant, the then owner of the suit properties, the plaintiffs and the appellants. According to the plaintiffs the suit properties have been given to them absolutely under the family arrangement and that the appellants to whom other properties have been allotted under the said family arrangement have been wrongfully asserting title to the suit properties and interfering with their possession.

2. The appellants resisted the suit contending that they were not willing parties to the said family arrangement, that their thumb impressions have been obtained in Exhibit A-1 by deceit and that in any event, Exhibit A-1 is not admissible in evidence for want of registration. They also denied the status of the first plaintiff as the third wife of the second defendant and the status of the second plaintiff as his legitimate daughter. The first defendant is the daughter of the second defendant through his first wife and the third defendant is his second wife and it is claimed that by a settlement deed Exhibit B-1, dated 26th October, 1966 the suit properties had been settled on them by the second defendant and that, therefore, the plaintiffs cannot claim any title to the suit properties. The second defendant died pending the suit.

3. On these rival contentions, the trial Court held that the marriage of the first plaintiff with the second defendant is void as the second wife was then alive and that, therefore, the second plaintiff is not the legitimate daughter of the second defendant. The trial Court held that even then the family arrangement pleaded by the plaintiffs was valid, that in pursuance of the said arrangement the suit properties had been allotted to the second defendant and the plaintiffs and that on the death of the second defendant it was the plaintiffs who became entitled to the suit properties. It also held that Exhibit B-1 on which the appellants relied was not valid.

4. On appeal, the lower appellate Court also agreed with the view of the trial Court that the marriage of the first plaintiff with the second defendant was void that the second plaintiff cannot be treated as the legitimate daughter of the second defendant. It, however, held that the plaintiffs are entitled to claim title to the suit properties on the basis of the family arrangement, Exhibit A-1. On the question whether the family arrangement is inadmissible in evidence for want of registration, it held that it is merely a record of what had already been done and that the actual allotment of the properties was not under Exhibit A-1, but had been done orally earlier at the mediation of panchayatdars. It however disagreed with the view of the trial Court that under the terms of the family arrangement the plaintiffs became entitled to the entirety of the properties after the death of the second defendant,

and held that after the death of the second defendant plaintiffs and defendants 1 and 3 will be entitled to inherit his 1/3rd share in the suit properties and that therefore, the plaintiffs will be entitled only to a 5/6th share and not to its entirety.

5. In this appeal the learned Counsel for the appellants makes three submissions. (1) that the family arrangement contained in Exhibit A-1 is invalid and inadmissible in evidence for want of registration; (2) that even if it is valid and admissible in evidence, it will not confer title to the suit properties on the plaintiffs who are not members of the family of the second defendant; and (3) that even if the plaintiffs are entitled to claim title to the suit properties on the basis of the family arrangement, they cannot claim to succeed to the second defendant's 1/3rd share in the suit properties.

6. On the question as to whether Exhibit A-1 has been duly executed, both the Courts below have held that the defendants 1 and 3 were consenting parties thereto and that it was not brought about by deceit as alleged by them. I have no reason to disagree with the said finding.

7. As regards the question as to whether Exhibit A-1 is admissible in evidence for want of registration, the learned Counsel for the appellants contends that the document itself creates a right *in praesenti* in favour of the parties to the document and that, therefore, it has to be registered. In this connection reference is invited to the decision of the Supreme Court in *Tek Behadur Bhujil* v. *Debi Singh Bhujil*[1]. In that case it was held that when a family arrangement is brought about by a document, such a document requires registration as it would amount to a document of title declaring for future what rights and in what properties the parties possess. But the very case has laid down that if a document is no more than a memorandum of what had been agreed to by the parties earlier, it does not require compulsory registration under section 17 of the Registration Act, for a family arrangement as such can be recorded in writing as a memorandum of what has been agreed upon.

8. In this case both the Courts below have held that Exhibit A-1 is a record of the family arrangement which had been orally arrived at between the parties in the presence of mediators and that, therefore, it does not require registration. They also referred to the evidence adduced by the plaintiffs to show that the panchayat went on for a number of days, that taking into consideration the rival contentions the panchayatdars finally decided what properties should be allotted to defendants 1 and 3 and the plaintiffs along with the second defendant and that only thereafter such an allotment had been made, Exhibit A-1 was prepared in accordance with such an arrangement. They also referred to the evidence of defendants 1 and 3 as D.Ws. 1 and 2 where they had admitted that such a panchayat was in fact held, though they had denied that any arrangement was finally arrived at. They further referred to the evidence of P.Ws. 4 to 6, the panchayatdars, who had stated that the properties had been allotted in pursuance of the oral arrangement entered into before them, that the suit properties came to be possessed and enjoyed by the plaintiffs along with the second defendant ever since the date of the arrangement, and that Exhibit A-1 was subsequently prepared merely to serve as a record of the allotment that had been made earlier. The question therefore is whether Exhibit A-1 is merely a record of a past transaction or whether it creates rights *in praesenti*. It is well established that a family arrangement can be made orally, and if made orally, there being no document no question of registration arises, that if the family arrangement is reduced to the form of a document registration is necessary when the value covered by the document is Rs. 100 or upwards. But whether the family arrangement is reduced to the form of document is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purposes with which it was written. In this case Exhibit A-1 merely sets out the items allotted to each of the parties. Though it does not refer

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1. (1966) 2 S.C.J. 290 : A.I.R. 1966 S.C. 292.

to the earlier arrangement said to have been entered into before the panchayatdars, on a perusal of the terms of Exhibit A-1 it could be clearly inferred that there should have been some arrangement by which the properties came to be allotted as the document itself does not set out the circumstances under which the second defendant who is the exclusive owner gave up his rights in respect of the properties allotted to defendants 1 and 3 and also to the plaintiffs. It is, clear that something should have happened before Exhibit A-1 was written and attested by panchayatdars. In this view the oral evidence is quite material. As already stated, the oral evidence indicates that there was an arrangement entered into by the parties before the panchayatdars and it is that arrangement which came to be recorded under Exhibit A-1. I have to, therefore, hold that Exhibit A-1 is merely a memorandum recording the arrangement entered into earlier in order that there may not be any hazy notions about it in future. As a matter of fact, even defendants 1 and 3 have admitted that there was in fact a panchayat, but they would say that no final arrangement was arrived at. Their version that no final arrangement was arrived at before the panchayatdars cannot be accepted, for Exhibit A-1 shows that they were willing parties to the family arrangement and that such an arrangement was made long before Exhibit A-1 came to be written. I have to, therefore, agree with the Courts below that Exhibit A-1 is not invalid for want of registration and that it is admissible in evidence.

9. With reference to the second question, it is contended that the first plaintiff's marriage with the second defendant being admittedly void, herself and the second plaintiff who is an illegitimate daughter cannot be the members of the family of the second defendant and as such they cannot claim any rights under the family arrangement. It is stated that a family arrangement can take place only between the members of the family, that therefore, the share allotted to the second defendant and the plaintiffs as a group should go to the benefit of the second defendant alone and that the plaintiffs cannot claim any benefit thereunder. What is in effect contended is that it is only those persons who are entitled to a share in the propery who can be parties to a family settlement and that persons who cannot, in law, claim a share in the property cannot take the benefit under a family settlement. But it is well established that a party who takes benefit under a family settlement need not necessarily be shown to have, under the law, a share in the property and all that is necessary to show is that the parties are related to each other in some way and have a possible claim to the property or even a semblance of claim on some ground or other. This is clear from the decision of the Judicial Committee in *Rangaswami Goundan* v. *Nachiappa Goundan*[1], and the decision of the Supreme Court in *Ram Charan* v. *Girja Nandini*[2]. The evidence in this case is clear that there were disputes between the second defendant and the plaintiffs on the one hand and the first and third defendants on the other, and the family arrangement was that the second defendant is to part with some of his properties in favour of defendants 1 and 3 and retain the rest of the properties for the benefit of himself and plaintiffs 1 and 2. The above arrangement entered into between the second defendant and defendants 1 and 3 who are admittedly members of his family is admittedly valid as a family settlement though as part of the arrangement certain rights have been conferred in favour of the plaintiffs in relation to the properties retained by the second defendant. The plaintiffs are therefore entitled to claim rights in the suit property on the basis of the said family settlement.

10. Coming to the third question it is seen that the plaintiffs had claimed exclusive title to the suit property on the basis of the family settlement, and the trial Court had upheld that claim presumably on the basis that the allotment of the suit property was joint and that the plaintiffs as survivors are entitled to have the benefit of the entirety of the property on the death of the second defendant. But the lower appellate Court took the view that there is no question of survi-

1. I.L.R. 42 Mad. 523 : 46 I.A. 72 : 36 M.L.J. 493 : A.I.R. 1918 P.C. 196.
2. (1966) 1 S.C.J. 61 : (1965) 3 S.C.R. 841 : A.I.R. 1966 S.C. 323.

vorship arising even if the allotment has been made jointly in favour of the plaintiffs and the second defendant in the family settlement and that the plaintiffs as well as defendants 1 and 3 are entitled to succeed to the second defendant's 1/3rd share in the suit property. It therefore held that the plaintiffs are entitled only to a 5/6th share in the suit property. The lower appellate Court has stated that the plaintiffs can also succeed to the second defendant's share as heirs along with defendants 1 and 3 even though it has held earlier that the marriage of the second defendant with the first plaintiff is void and therefore the second plaintiff is only an illegitimate child of the second defendant. It is not clear as to how the lower appellate Court proceeded to consider the plaintiffs as heirs of the second defendant for the purpose of inheritance. Before me it is not disputed that the first plaintiff will not be a heir of the second defendant as her marriage with the second defendant is void. The learned Counsel for the respondents would however contend that even if the first plaintiff's marriage with the second defendant is void, the second plaintiff born of such void marriage will be taken to be legitimate in view of section 16 of the Hindu Marriage Act, hereinafter referred to as the Act. But the learned Counsel for the appellants would contend that on a strict construction of the said section it is only when there is a decree of nullity in respect of a marriage under section 11 or section 12 of the Act the child begotten or conceived before that decree, can be considered to be a legitimate child of the parties to the marriage and not in a case where a decree of nullity had not been passed and that the operation of that section should be confined only to cases where the Court has granted a decree of nullity. Section 16 of the Act is as follows:

"Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parties in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents".

The learned Counsel for the appellants appears to be right when he says that the language employed in section 16 is such that while children born of void marriage will be legitimate if a decree of nullity had been granted under section 11, they will be illegitimate if no decree of nullity had been granted. But that certainly cannot be the legislative intention. The wording of section 16 so far as it is relevant to a marriage void under section 11 leads to an anomalous and startling position which could have hardly been contemplated by the Legislature. The position and status of children of void marriage should obviously be the same whether the marriage is declared a nullity under section 11 or otherwise. It is seen that the Legislature has borrowed in this section the language of section 9 of the Matrimonial Causes Act, 1950, which deals with the legitimacy of children of only voidable marriages and does not refer to children of marriages void *ipso jure* and made the section applicable to cases of both voidable and void marriages annulled by a decree of Court. Though the language of the section is more appropriate to voidable marriages, it has been applied to void marriages as well, presumably with the object of ensuring that where a marriage was in fact solemnised but was void for any of the grounds mentioned in section 11, the children of such marriage should not be bastardised whether a decree of nullity is passed or not. But the above obvious intention of the Legislature has not been duly carried out by a proper wording of the section. As pointed out by the learned Counsel for the appellants, the language

of the section is so plain and unambiguous and it would be straining the language beyond permissible limits to say that the children born of void marriages are legitimate even in cases where a decree of nullity had not been granted. If a third party successfully challenges the validity of the marriage in other proceedings on the ground that it is void by operation of section 11, the children of such a marriage would still be illegitimate as the decree of nullity has not been granted at the instance of either of the parties by invoking the provisions of the Act. In view of the language of the section being plain and unambiguous, it is not possible for the Court to construe the same in a different manner having in mind the presumed intention of the Legislature even if it appears to be obvious. I am, therefore, of the view that this is a *casus omissus* which the Courts cannot reach for no canon of construction will permit the Court to supply what is clearly a lacuna in the statute and it is for the Legislature to set right the matter by a suitable amendment of the section. I also find that in a decision of this Court in *Gouri Ammal* v. *Thulasi Ammal*[1], it has been held that a decree of nullity cannot be passed after the death of one of the spouses and a child born of a marriage of which nullity was sought but could not be granted in view of the death of one of the spouses is not entitled to the benefit of section 16. Therefore, on the language of section 16 as it stands today, it is not possible for me to hold that the second plaintiff is a legitimate child of the second defendant. Thus both the plaintiffs not being the legal heirs of the second defendant, they cannot claim any interest in the 1/3rd share left by the second defendant in the suit property and the first and third defendants being admittedly the legal heirs, they will be entitled to succeed to that 1/3rd share. The decree and judgment of the lower appellate Court have, therefore, to be modified to the effect that the plaintiffs will be entitled to a 2/3rd share in the suit property.

11. The result is the second appeal is allowed in part to the extent indicated above. There will, however, be no order as to costs. No leave.

1. 75 L.W. 559 : A.I.R. 1962 Mad. 510.

P.S.P. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Maharajan, J.*

Ayyasamy Gounder .. *Appellant**

v.

Nachimuthu Gounder .. *Respondent.*

Execution proceedings—Civil Procedure Code (V of 1908), section 5—Arrest of judgment-debtor ordered on finding that he had means to pay—Execution Petition terminated on ground of judgment-debtor not being found—Validity—Fresh execution petition only a continuation of the earlier one—No need for fresh enquiry for ordering arrest.

Where after due enquiry the Court passed an order against the judgment-debtor directing his arrest after following the procedure laid down in section 51, Civil Procedure Code, and the judgment-debtor did not challenge the order, the order became binding and final. [*Para.* 1.]

Where the directions for the arrest of the judgment—debtor could not be completed as the judgment-debtor could not be found and the Execution Petition was dismissed without granting an opportunity to the decree-holder to pay batta again so that a fresh warrant may issue against the judgment-debtor, the order of dismissal is indefensible. [*Para.* 1.]

A fresh execution petition for the arrest of the judgment-debtor filed without any marked lapse of time from the date of the original order directing such arrest must be regarded, in the circumstances of the case, as a continuation or revival of the earlier execution petition, particularly when no fresh circumstances had, in fact, arisen or intervened between the date of the second execution petition such as to justify the judgment-debtor in asking for another opportunity to prove his non-liability for arrest. [*Para.* 2.]

*A.A.A.O. No. 5 of 1973. 18*th October*, 1973.

Obiter dicta of A. S. Panchapakesa Aiyar, J., in *Kotha Venkatasubba Rao* v. *Mageti Sreeramulu*, A.I.R. 1949 Mad. 470 : (1948) 2 M.L.J. 648, not followed.

Cases referred to:

Kotha Venkatasubba Rao v. *Mageti Sreeramulu*, (1948) 2 M.L.J. 648 : A.I.R. 1949 Mad. 470 ; *Gopichand* v. *Smt. Brahmo Devi*, A.I.R. 1968 Delhi 101.

Appeal against the Order of the Court of the Subordinate Judge, Udumalpet, dated 29th November, 1972 and made in C.M.A. No. 43 of 1972 (E.P. No. 153 of 1971 in O.S. No. 1835 of 1970 on the file of the Court of the District Munsif, Pollachi).

M V. Chandran, for Appellant.

T. R. Rajagopalan and *T. R. Rajaramani* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises in the following circumstances. The appellant, Ayyasamy Gounder is the judgment-debtor in O.S. No. 1835 of 1970 on the file of the District Munsif's Court, Pollachi. On 30th March, 1970, Nachimuthu Gounder, the respondent herein, obtained a decree for Rs. 1,633-50 against the appellant. No payment was made towards the decree and on 14th September, 1971, the decree-holder filed E.P. No. 153 of 1971 under Order 21, rule 11 (2), Civil Procedure Code, praying for the arrest of the judgment-debtor. Notice of this E. P. was ordered and the judgment-debtor was served. As he remained *ex parte* on 2nd November, 1971, arrest was ordered. Thereupon, the judgment-debtor engaged Counsel and filed a petition to set aside the *ex parte* order passed on 2nd November, 1971. This *ex parte* order was set aside and the judgment-debtor granted time to file his counter to E.P. No. 153 of 1971. He filed his counter, in which he contended that he had no means to pay the decretal amount and that he had in his possession only a small house in Sikkalampalayam village, which was under a mortgage for Rs. 1,000. The Court posted the matter for enquiry. The judgment-debtor examined himself as R.W. 1 during the enquiry and the decree-holder examined himself as P.W. 1. After hearing arguments, the Court below passed an order on 20th January, 1972, allowing the petition of the decree-holder with costs and directing the judgment-debtor to be arrested by 7th February, 1971. The order contains a full discussion of the plea of the judgment-debtor on the merits and a finding to the effect that though he had the means to pay the decretal amount, he was purposely evading payment thereof. Be it noted, that this finding was arrived at after following the procedure laid down in section 51, Civil Procedure Code. The judgment-debtor did not challenge this order. The order therefore became binding and final. What transpired after the date of the order now becomes relevant. The order was passed, as I have said, on 20th January, 1972, directing the arrest of the judgment-debtor by the 7th February, 1972. On 7th February, 1972, the E.P. was taken up and the following endorsement made under the initials of the District Munsif "J. D. not found; E.P. dismissed". If the judgment-debtor was not found, it was due to no fault on the part of the decree-holder and the Court ought to have granted an opportunity to the decree-holder to pay batta again, so that a fresh warrant might issue for the arrest of the judgment-debtor. Evidently, the Court was in a hurry to close the E. P. purely for statistical purposes and without any regard for the interests of the decree-holder, who was anxious to pay batta and get the order of arrest passed on 20th January, 1972, executed. In fact, on 8th February, 1972, the decree-holder, who came to know about the dismissal of the E.P. filed a fresh petition (E.P. No. 34 of 1972) praying for the arrest of the judgment-debtor. In pursuance of this E. P. notice of arrest was again issued to the judgment-debtor, who appeared by Counsel on 6th March, 1972, and after getting repeated adjournments for filing a counter, ultimately filed a counter on 12th April, 1972, repeating the same objections as he had raised in his counter to E.P. No. 153 of 1971. The Court below again adjourned the matter for enquiry. An enquiry was held on 25th July, 1972 and neither party would appear to have offered any evidence on that day. The learned District

Munsif therefore heard the arguments of both the parties and reserved orders on 25th July, 1972. On 29th July, 1972, he passed a speaking order in which he held that the judgment-debtor had the means to pay the decretal amount, and he consequently directed the arrest of the judgment-debtor by 10th August, 1972. In coming to this conclusion, the learned District Munsif was influenced by two considerations, viz. : (1) that the judgment-debtor had put forth the same contentions as as he did in E.P. No. 153 of 1971 and the same had been negatived and his arrest ordered; and (2) even in his counter to E.P. No. 34 of 1972 the judgment-debtor had admitted that he owned a house, though he contended without producing the mortgage deed that it had been mortgaged for Rs. 1,000. This contention according to the learned District Munsif lacked *bona fides*. This is in short the basis of the order against which the judgment-debtor preferred an appeal, C. M. A. No. 43 of 1972 on the file of the sub-Court, Udumalpet. This appeal was dismissed with costs. The appellant's request for a remand was refused on the ground that more than sufficient opportunity had been given to him to lead evidence and that there was no record to indicate that the appellant wanted to adduce any evidence or that the executing Court refused to grant him a chance to lead evidence. It is against this order that the present appeal has been filed.

2. Learned Counsel for the appellant strongly relies on what I consider to be *obiter dicta* occurring in the decision of A. S. P. Ayyar, J., in *Kotha Venkatasubba Rao* v. *Majeti Sreeramulu*[1]. In that case, the judgment-debtor pleaded that he had no means to pay the decretal debt. But the executing Court simply rejected that contention without recording the reasons contemplated in section 51, Civil Procedure Code, and without finding positively that the judgment-debtor had, since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and had refused or neglected to pay the same, or that, after the institution of the suit in which the decree was passed, he had dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property within the meaning of section 51 (*a*) (2), and (*b*), or that he was likely to abscond, or leave the jurisdiction of the Court within the meaning of section 51 (*a*) (1). It was urged for the decree-holder in that case that the judgment-debtor was on a former occasion ordered to be arrested and that full reasons had been then given by the Court for his arrest and that was why the lower Court failed to give reasons for its order upon the fresh E.P. filed on the subsequent occasion. The learned Judge rejected this contention on the ground that the Court acted without jurisdiction in ordering the arrest of the judgment-debtor without recording its reasons under section 51, Civil Procedure Code. This is the *ratio decidendi* of that ruling. But, while laying down that *ratio* the learned Judge went, if I may say so with respect, beyond the necessities of the situation to make the following remarks by way of *obiter*. "My view is that reasons must be given *every time* a man is ordered to be arrested, and in every proceeding where he is ordered to be arrested, even if it is on the same day, for, cases differ, and much depends on lapse of time also. The Legislature has thought fit to order arrest and detention of civil debtors in jail only where the conditions prescribed in section 51 of the Civil Procedure Code, are strictly satisfied. The lower Court did not even say that it was relying on the reasons already given. It therefore acted without jurisdiction in ordering the arrest of the petitioner without recording its reasons under section 51, Civil Procedure Code." The *obiter dicta* would appear to indicate that if the lower Court had said that it was relying on the reasons given in the previous order, the learned Judge might have held that it had complied with the provisions of section 51, Civil Procedure Code. Howevei, the facts of this case are different and there has been no marked lapse of time between the date of the original order and the date on which the second E. P. was filed. As I have already observed, the original order dated 20th January, 1972, had fully discussed the reasons for directing the arrest of the appellant and that order was passed after giving ample opportunitv to

1. (1948) 2 M.L.J. 648; A.I.R. 1949 Mad. 470

the judgment-debtor to lead evidence in accordance with the procedure laid down in section 51, Civil Procedure Code. Even learned Counsel for the appellant does not attack the earlier order on the ground of any procedural irregularity, though he complains that the reasoning contained in that order is unsound. In pursuance of the said order the decree-holder paid batta for arrest of the judgment-debtor and the Court dismissed the E.P. because the judgment-debtor was not to be found. This order of dismissal is indefensible and was obviously made for statistical purposes and did not lawfully terminate the E.P. The inability of the amin to get at the judgment-debtor was not due to any default on the part of the decree-holder. If the decree-holder had failed to pay batta, the Court would have been justified in dismissing the E.P. But the decree-holder did pay batta and would have paid batta again after the arrest warrant was returned for the reason that the judgment-debtor could not be found. But without giving any opportunity to the decree-holder to pay batta, the Court proceeded illegally to dismiss the E.P. The very next day, after the dismissal of the E.P., the decree-holder filed the next E.P. praying for the same relief. The subsequent E. P. must be regarded in the circumstances merely as a continuation or revival of the earlier E. P. and to serve as a reminder to the Court that though it had ordered the arrest of the judgment-debtor on the merits, the amin of the Court had failed to carry out the order and therefore a fresh process for the arrest of the judgment-debtor should issue. If as a result of an error committed by the Court the original E.P. was dismissed, I see no reason why the decree-holder should be penalised by having to face once more a *de novo* enquiry regarding the means of the judgment-debtor and by having to secure a repetition of the order already passed. It would, in my view, be a wasteful and needless ritual in the circumstances of this case to issue notice again to the judgment-debtor, and enable him to raise and establish the plea which had already been judicially considered and rejected. No fresh circumstance had, in fact, arisen or intervened between the date of the order of arrest and the date of the second E.P., such as to justify the judgment-debtor in asking for another opportunity to prove his non-liability for arrest. Learned Counsel for the judgment-debtor says that even if the second E.P. is to be regarded as a continuation or revival of the earlier E.P. still inasmuch as a fresh order for arrest is asked for, the procedure laid down in section 51, Civil Procedure Code, must be gone through again. I am unable to agree. The procedure had been gone through in the earlier petition and an order directing the arrest of the judgment-debtor had been passed and that order had not been challenged either by way of review or in appeal. The second E.P. is, as I have said, merely a continuation of the proceedings in the earlier E.P. and it gives the Court an opportunity to rectify its error in having dismissed the earlier E.P. for no fault whatever of the decree-holder. The second E.P. must therefore be regarded merely as a request to the Court to carry out the order, which it had already passed, by issuing a fresh arrest warrant and directing the amin or the process server of the Court to arrest the judgment-debtor in accordance with the earlier order. However, what happened in the Court below was that the second E.P. was wrongly regarded as an independent E.P. and notice was ordered again to the judgment-debtor, who filed a counter again and repeated the contention that he was not liable to be arrested. However, he failed to adduce any evidence, with the result that his contention was overruled by both the Courts below. The procedure adopted by the Executing Court may be exposed to the objection that it is not strictly in accordance with section 51, Civil Procedure Code. But in the view I have taken of the subsequent E.P., this objection would have no substance. The Courts below ought to have treated the second E.P. merely as a revival of the earlier E.P. and as a reminder to the Court of its duty to carry out its own order by issuing a fresh process for the arrest of the judgment-debtor in pursuance of the order dated 20th January, 1972 in which case neither a fresh notice to the judgment-debtor nor a fresh enquiry would be necessary. The consequence is the appeal fails and it will stand dismissed with costs.

3. Learned Counsel for the appellant says that the *obiter dicta* of A.S.P. Ayyar, J.,

have been followed with certain qualifications by the Delhi High Court in *Gopichand* v. *Smt. Brahmo Devi*[1], and that consequently he may be granted leave to prefer a Letters Patent Appeal. Leave granted.

P.S.P. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K.N. Mudaliyar, J.*

The Corporation of Madras by its Commissioner .. *Petitioner**

v.

P.G. Arunachalam .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 47, *rule* 1—*Review of judgment—Decision not brought to notice of Court due to inadvertence—Whether ground for review.*

The plea of "inadvertence" is not a ground within the meaning of Order 47, rule 1, Civil Procedure Code, for reviewing the order of the High Court.

[*Para.* 2.]

Case referred to :

L. Sivanarayana Das v. *Corporation of Madras, Writ Appeal No.* 188 of 1967.

Application, under section 114 and Order 47, rule 1 of the Civil Procedure Code, for review of the Judgment of the High Court, dated 23rd August, 1973 in W.P. No 230 of 1971 presented to the High Court under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in E.D.C. C1/1873/68 dated 10th November, 1969 on the file of the Respondent. The Commissioner, Corporation of Madras and quash the said order.

Stanislas for *Thillai Villalan,* for Petitioner.

The Court made the following

ORDER:—The petitioner prays for review of the judgment of this Court made in W.P. No. 230 of 1971 dated 28th August, 1973.

2. The ground on which the petitioner seeks to get the order in question reviewed is set out here below:

> "The petitioner further submits that due to inadvertence, the Respondent in the Writ Petition was not able to produce the above mentioned unreported decision on the date of hearing of the writ petition. The Respondent did not urge anything against any procedural aspect of the enquiry. Hence if the decision had been placed before this Hon'ble Court, the Writ Petition should have been dismissed."

Admittedly, the judgment of the Division Bench (Veeraswami, C.J., and Gokulakrishnan, J.,) in *L. Sivanarayana Das* v. *Corporation of Madras represented by its Commissioner and another*[1] has not been brought to my notice. The petitioner pleaded "inadvertence" for his not producing the judgment of the Division Bench. I am afraid, under Order 46, rule 1 "in advertence" is not a ground. The judgment of the Division Bench was delivered as early as 15th July, 1969, and it is significant to notice that the petitioner was the first respondent in that case. The respondent in W.P. No. 230 of 1971 (the review petitioner) was possessed of the knowledge of the existence of the judgment of the Division Bench since 1969. The plea of "inadvertance" is not a ground within the meaning of Order 47, rule 1 for reviewing the order of this Court. Petition dismissed.

S.J. ——— *Petition dismissed.*

1. A.I.R. 1968 Delhi 101.

*Rev. Writ M.P. No. 9117 of 1973 in W.P. No. 230 of 1971. 19*th October,* 1973.

1. W.A. No. 188 of 1967.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*T. Ramaprasada Rao, J.*

Thavasikani Nadar .. *Petitioner**

v.

The Election Commissioner (Principal District Munsif of Ambasamudram), Ambasamudram Village and Taluk, Tirunelveli District and another .. *Respondents.*

(A) *Constitution of India* (1950), *Article* 226 *—Finding of fact by election Court under the Tamil Nadu Panchayats Act—Cannot be interfered with in writ petition.*

(B) *Tamil Nadu Panchayats Act* (*XXXV of* 1958) *—Rules for elections—Election petition—Delay in filing of—Election Commissioner if has power to condone the delay——Applicability of section* 5, *Limitation Act.*

The rules framed for the purpose of trying an election dispute arising under the Tamil Nadu Panchayats Act, do not provide for excusing the delay in the presentation of an election petition. No doubt the election rules do not expressly exclude the application of section 5 of the Limitation Act. In such circumstances the District Munsif, who is the Election Commissioner, if he was acting as a civil Court might have probably exercised his discretionary jurisdiction and entertained the application, but as the trial of an election petition is not given to an ordinary civil Court but to a named individual as *presona designata* namely, the District Munsif, of a particular place the general dicta that in the absence of any prohibition under the Act under which the Court is functioning, the general enabling provisions under the Limitation Act could be attracted is not available to such a Tribunal. [*Para.* 7.]

In the absence of any special provisions enabling the Election Commissioner to excuse the delay in the presentation of an election petition, the invocation of the general principles and the normal provisions which would enable under similar circumstances a civil Court to excuse the delay will not apply to an election Court. [*Para.* 8.]

Cases referred to:—

Parthasarathy v. *Koteswara Rao,* I.L.R. 47 Mad. 369 : 46 M.L.J. 201 : A.I.R. 1924 Mad. 561 ; *Rathnam Pillai* v. *Sellappa Reddiar,* (1963) 2 M.L.J. 381 ; *Venkateswara Rao* v. *Narasimha Reddi,* (1969) 2 S.C.J. 505 : (1970) 1 M.L.J. (S.C.) 8 : (1970) 1 An.W.R. (S.C.) 8 : (1969) 1 S.C.R. 679.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the 1st Respondent made in I.A. No. 41 of 1970 in Election O. P. No. 51 of 1970 on the file of the Election Commissioner (Principal District Munsif of Ambasamudram), Ambasamudram dated 25th March, 1971 and quash the said order and made therein.

J. Samuel, for Petitioner.

K. Hariharan and *S. Gopalarathnam,* for Respondents.

The Court made the following

ORDER :—The proceedings in this writ petition arise out of an order passed by the District Munsif, Ambasamudram, as an Election Commissioner, constituted under the provisions of the Tamil Nadu Panchayats Act, 1958. An election was held to choose the Chairman of the Panchayat Union, Kalakad on, 13th August, 1970. The petitioner and the respondent were the contestants. The respondent secured nine votes and the petitioner eleven votes. The petitioner was declared elected as the Chairman. The respondent apparently desired to file an election petition. Under the rules, an election petition had to be filed within 15 days from the date of declaration of the result of the election. The election petition was filed on 27th November, 1970, nearly three months after the expiry of the prescribed period of limitation. When the respondent filed such an application before the Election Commissioner

* W.P. No. 1446 of 1971. 26*th July,* 1973.

and pleaded that his failure to file the election petition in time was not wilful and that he was prevented from sufficient cause f·om filing it in time. The reasons given by the respondent for filing the election petition beyond the prescribed time were accepted as *bona fide* reasons and the delay in the presentation of the election petition was excused by the election Court. The petitioner as the respondent in the election petition stated that the election petition was not maintainable, as section 5 of the Limitation Act does not apply to such petitions and that the election Court was *persona designata* and, therefore, unless there was an express power conferred under the Tamil Nadu Panchayats Act or the election rules made thereunder, the Election Commissioner (the District Munsif) as *persona designata* had no juis-jurisdiction to excuse the delay.

2. On the first question the Election Commissioner agreed that there was sufficient cause which prevented the respondent from filing the election petition in time. Exercising jurisdiction under Article 226 of the Constitution, I am not inclined to interfere with the finding on merits rendered by the Election Court. But the more important point is, whether the Election Court which designated as a tribunal *persona designata* had the power to entertain an application for excusing the delay in the presentation of an election petition.

3. The Election Commissioner was of the view that Section 5 of the Limitation Act would apply and that he had the requisite jurisdiction. It is as against this part of the order that the petitioner is aggrieved.

4. The Election Court relying upon certain decisions cited by the respondent is of the view that any pleading presented before a tribunal which is *persona designata* but after the prescribed period of time, can be entertained by invoking section 5 of the Limitation Act read with section 29 (2) thereto. If a tribunal is specially designated as a *persona designata* then it is always understood that the person pointed out or described individually as the tribunal is the person who is to sit in judgment. As pointed, out by the learned author Osborne in his 'A concise Law Dictionary' a *persona designata* means "a person pointed out or described as an individual, as opposed to a person ascertained as a member of class, or as filling a particular character."

5. A Full Bench of our Court in *Parthasarathy* v. *Koteswara Rao*[1], pointed out that the jurisdiction of the High Court under section 115 of the Code of Civil Procedure to revise the orders decided by a Judge designated as *persona designata* depends on whether the Judges therein referred to are acting as Courts, or acting merely as *persona designata*, that is to say, persons selected to act in the matter in their private capacity and not in their capacity as Judges. Thus, it is clear that the phrase '*persona designata*' is a pointer to the situation that it is a particular person that is referred to as the adjudicator and his power and jurisdiction is not to be judged by the office or the class to which he belongs. He acts as directed by the legal authority under which he is created. He being a creature of a particular statute, he has to look to the provisions of such a statute for exercise of his power as such a tribunal but cannot overstep the periphery of such a peculiar jurisdiction specially conferred on him. As pointed out by S. Ramachandra Iyer, C. J., in *Rathnam Pillai* v. *Sellappa Reddiar*[2], the Election Commissioner (District Munsif) is not regarded as an ordinary civil Court with the trappings or right of appeal and right of revision. As the hummings of a civil Court are conspicuously absent in the tribunal designated as *persona designata* he has to strictly follow the procedure prescibed by the statute or the rules made thereunder under which his office itself is created.

6. Under similar circumstances, but while dealing with the Representation of the People Act of 1951, the Supreme Court in *Venkateswara Rao* v. *Narasimha Reddi*[3], said that it is well settled that an election petition stands on a footing different from a civil proceeding and that the trial of such a petition and the powers of the Court in respect thereof

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1. 46 M.L.J. 201 : I.L.R. 47 Mad. 369 A.I.R. 192 Mad. 561.
2. (1963) 2 M.L.J. 381.
3. (1969) 2 S.C.J. 505 : (1970) 1 M.L.J. (S.C.) 8: (1970) 1 An.W.R (S.C.) 8 : (1969) 1 S.C.R. 679.

are all circumscribed by the Act, and that the Limitation Act cannot apply to proceedings like an election petition, inasmuch as the Representation of the People Act is a complete and self contained Code which does not admit of the introduction of the principles or the provisions of law contained in the Indian Limitation Act. As the respondent was not represented, I requested Mr. S. Gopalarathnam to assist me as *amicus curiae*. In his usual manner Mr. Gopalarathnam, rendered considerable help to this Court to determine the limits of jurisdiction of a tribunal named as *persona designata*.

7. It is conceded by Mr. Gopalarathnam, that the rules framed for purposes of trying an election dispute arising under the Tami Nadu Panchayats Act, do not provide for excusing the delay in the presentation of an election petition. No doubt the election rules do not expressly exclude the application of section 5 of the Limitation Act. In such circumstances the District Munsif, who is the Election Commissioner in this case, if he was acting as a Civil Court might have probably exercised his discretionary jurisdiction and entertained the application , but as the trial of an election petition is not given to an ordinary civil Court but to a named individual as *persona designata*, namely, the District Munsif of a particular place the general dicta that in the absence of any prohibition under the Act under which the Court in functioning, the general enabling provisions under the Limitation Act could be attracted is not available to such a tribunal. If the Election Court is designated as *persona designata* it has a limited jurisdiction. It cannot expand such a special jurisdiction by invoking the principles of decency or convenience and ought not to sacrifice justice to notions of delicacy of its own.

8. In the absence of any special provisions enabling the Election Commissioner (the District Munsif) to excuse the delay in the presentation of an election petition, the invocation of the general principles and the normal provisions which would enable under similar circumstances, a Civil Court to excuse the delay will not apply to an election Court.

9. The order, therefore, is completely without jurisdiction and has to be set aside. The writ petition is allowed. There will be no order as to costs.

10. I express my thanks to Mr. S. Gopalarathnam for the ready and willing help he gave enabling me to decide the question in issue.

V.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*A. Varadarajan, J.*

M.A.H. Farook .. *Petitioner**

v.

Kalikrishna Dass .. *Respondent.*

(A) *Civil Procedure Code (V of* 1908), *section* 133 (1) (*x*), *Order* 16, *rule* 19 *and Order* 26, *rule* 4 (1) (*a*)—*Chief Minister of Pondicherry—Application to be exempted from personal appearance and to be examined on commission—Tenability of claim.*

(B) '*State*' *in section* 133 *Civil Procedure Code, if includes Union Territory —Meaning of expression Ministers of States—General Clauses Act* (X of 1897), *sections* 3 *and* 4 —*Constitution of India* (1950), *Articles* 239, 246, 366, 367, 372 *and* 372-*A*—*Interpretation.*

A person who is not a witness cannot seek to be examined on commission under Order 16, rule 19, Civil Procedure Code. [*Para.* 4.]

An application by a defendant to examine himself on commission should be treated differently from an application by a plaintiff who could choose the forum for action unlike the defendant. A defendant can claim under Order 26, rule 4 (1) (*a*) Civil Procedure Code to be examined on commission on the ground of distance. The fact that the petitioner is a defendant and the Court will not have the opportunity of observing his demeanour if he is examined on commission is not a sufficient ground to disallow the claim. [*Para.* 5.]

*C.R.P. No. 3060. 13*th September.* 1973.

Provisions of the Constitution cannot be interpreted in accordance with the General Clauses Act, 1897 as that Act has not been adapted for the interpretation of the Constitution because Article 367 of the Constitution has not been amended. The provisions of the General Clauses Act have to be applied in the interpretation of the Civil Procedure Code and the expression 'Ministers of State' in section 133 (1) (*ix*) of the Code, would, according to section 3 (58) of the General Clauses Act, include the Chief Minister of Pondicherry, a Union Territory. Therefore, he could claim exemption under section 133 of the Code from personal appearance in Court. [*Para.* 6.]

He cannot, however, claim to be examined on a commission in his own house. [*Para.* 8.]

Cases referred to :

Subramanian Chettiar, In re, (1954) 1 M.L.J. 449 : A.I.R. 1955 Mad. 210 ; *A. R. Lakshmana Chettiar* v. *Vadivelu Ambalam,* (1967) 1 M.L.J. 252 ; *Viswanathan Chetty* v. *Somasundaram Chetty* alias *Nagappa Chetty,* 46 M.L.J. 131 : A.I.R. 1924 Mad. 541 ; *S. K. Singh* v. *V. V. Giri,* (1970) 2 S.C.J. 768 : A.I.R. 1970 S.C. 2097; *Advance Insurance Co., Ltd* v. *Gurudasmal,* A.I.R. 1969 Delhi 336 ; *Kanniyan* v. *Income-tax Officer,* A.I.R. 1968 S.C. 627; *R. K. Sen* v. *Union,* (1966) 1 S.C.R. 430 : A.I.R. 1966 S.C. 644.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif of Ramanathapuram dated 7th December, 1972 and made in C. M. P. No. 1302 of 1973 in O. S. No. 173 of 1970.

K. Parasaran, for Petitioner.

V. R. Gopalan, for Respondent.

The Court delivered the following

JUDGMENT.—The respondent, a Madathipathi, filed the suit against the petitioner and three others in the District Munsif's Court, Ramanathapuram for the recovery of Rs. 750 from all the four defendants as the estimated cost of the *Samprokshanam* to be performed in Sri Ramanathaswami Temple at Rameswaram and for a permanent injunction restraining the first defendant, the Executive Officer of the Temple, from allowing non-Hindus to enter the Temple beyond the third *prakaram.* The allegation in the plaint is that the first defendant and the other defendants took the petitioner, the fourth defendant, a Muslim, upto the gate of the *sanctum sanctorum* of the Temple on 2nd May, 1970, honoured him by a *parivattam* and gave him *vibhuthi* and *kunkumam* holy Ganges water, and *kodi theertham* and *kunkumam* and that the petitioner threw the *vibhuthi* and *kunkumam* with contempt, used the Ganges water to rinse his hands and passed on the *kodi theertham* to his Personal Assistant and by these acts desecrated the Temple and necessitated *Samprokshanam.* The petitioner admitted that he was honoured with *parivattam* and taken by the first defendant upto the Maha Mantapam of the Temple and given *prasadams.* He has denied that he threw away the *vibhuthi* and *kunkumam* and used the Ganges water for rinsing his hands, and has stated that he accepted the *prasadams* given to him with due respect and reverence and passed them on to his confidential Assistant. He has pleaded in the written statement that the Government of Tamil Nadu has passed a Government Order lifting the prohibition against non-Hindus entering a Hindu Temple.

2. The petitioner, who is at present the Chief Minister of Pondicherry, filed the application, out of which this civil revision petition has arisen, under section 133 and Order 26, rules 1 and 4 of the Code of Civil Procedure, for being examined on commission at his residence at Pondicherry on 15th December, 1972 before his intended departure on 16th December, 1972 to a foreign country. He averred in the affidavit that Pondicherry is far away from the territorial jurisdiction of the District Munsif's Court, Ramanathapuram, that on account of pressure of work as Chief Minister of the State he was unable to attend the Court at Ramanathapuram for giving evidence and that it was just and necessary that he should be examined on commission. The respondent opposed the petition, contending that in these days of fast travel, no part of the country could be said to be far away from the jurisdiction of the lower Court. He

stated in his counter-affidavit that parties to the suit could not claim to be examined on commision. Regarding the alleged inability of the petitioner to attend the Court at Ramanathapuram on account of pressure of work, he contended that when the petitioner could go to foreign country he could very well come to the Court at Ramanathapuram for giving evidence. He further contended that it would not be possible for the Court to appreciate the petitioner's evidence in the proper perspective if he was not examined in Court. He apprehended danger to the person of himself and that of his advocate from certain political elements in Pondicherry in the event of their visiting Pondicherry in connection with the exmination of the petitioner on commission.

3. The learned District Munsif declined to accept the respondent's case that there would be any danger to the person of himself and that of his advocate if they visited Pondicherry in connection with the examination of the petitioner on commission. Nevertheless, he expressed the view that having regard to the status of the petitioner, the respondent's advocate might not be quite free to cross-examine the petitioner at Pondicherry as well as he could do in the Court at Ramanathapuram. Relying upon the decision of this Court in *Subramanian Chettiar*, In re[1], and *A. R. Lakshmana Chettiar* v. *Vadivelu Ambalam*[2], the learned District Munsif rejected the argument advanced on behalf of the petitioner that the demeanour of the witness is not of much importance. He expressed the view that the petitioner could not claim the exemption under section 133 of the Civil Procedure Code, except in cases in which he is sued in his official capacity for anything done in discharge of his duties as the Chief Minister of Pondicherry and has observed in his order that the inconvenience and expenses that the respondent would be put to if the petitioner had to be examined on commission at Pondicherry could not be overlooked. In this view, he dismissed the petition with costs.

1. (1954) 1 M.L.J. 449: A.I.R. 1955 Mad. 210.
2. (1967) 1 M.L.J. 252.

4. The learned Counsel for the petitioner stated that the distance between Pondicherry and Ramanathapuram is over 200 miles. It is only in the case of witnesses, Order 16, rule 19 (b) says :

> "No one shall be ordered to attend in person to give evidence unless he resides without such limits (local limits of the Court's ordinary original jurisdiction) but at a place less than fifty or where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where a Court is situate less than two hundred miles distance from the Court-house."

So, the petitioner who is not a witness cannot seek to be examined on commission under Order 16, rule 19, Civil Procedure Code as a witness on account of the distance between Pondicherry and Ramanathapuram.

5. The petitioner is the fourth defendant in the suit and as such he could not have chosen the jurisdiction of the lower Court. The Court should deal with an application of a defendant to examine himself as a witness on commission as distinguished from an application by the plaintiff, vide *Viswanathan Chetty* v. *Somasundaram Chetty* alias *Nagappa Chetty*[1]. The defendant's application should be treated differently and not like an application by the plaintiff who could choose the forum for the action unlike the defendant. Order 26, rule 4 (1) (a) says :

> "Any Court may in any suit issue a commission for the examination of any person resident beyond the local limits of its jurisdiction."

Panchapakesa Ayyar, J. in *Subramanian Chettiar*, In re[2], repelled the contention that a commission should not have been issued to examine a party, and a defendant, and has observed that a commission can be issued under the Code of Civil Procedure for the exmination of "any person" including a defendant. Therefore, the petitioner could claim, under the provisions of Order 26, rule 4 (1) (a),

1. 46 M.L.J. 131 : A.I.R. 1924 Mad. 541.
2. (1954) 1 M.L.J. 449 ; A.I.R. 1955 Mad. 210.

to be examined on commission having regard to the distance. Dealing with the contention that it was necessary to examine the person in Court so that the Court might observe the demeanour, Panchapakesa Ayyar, J., has observed in that decision.

> " I cannot agree that this would exclude the jurisdiction of the Court for issuing the commission. In all cases where a commission is issued, the Court cannot observe the demeanour of a witness. The value of ' demeanour' has been too much emphasized; demeanour is one of those subtle things which are important only when the evidence is evenly balanced. It also gives no opportunity for either side to cross-examine the Judge who observes the demeanour of the witness and acts on it. So it is one of those medieval reliefs, which, though they have some value, are not so important as to take away the rights under the Civil Procedure Code to issue a commission in deserving cases like this."

Even in *Viswanathan Chetty's case*[1], referred to above, where the defendant had been a resident of Rangoon with his family for many years, it has been observed by Krishnan, J., that the defendant should have been allowed to be examined on commission at Rangoon and that the watching of his demeanour which the lower Court had referred to in support of its order was not a sufficiently strong ground for dragging the defendant all the way from Rangoon to Ramnad. Therefore, the fact that the petitioner is a defendant and that the Court will not have the opportunity to observe his demeanour if he is examined on commission, is not a sufficient reason for disallowing the petitioner's application for examination on commission.

6. It has not been contended by the respondent that Pondicherry is not a State and that the petitioner cannot fall within the category of "Ministers of States" mentioned in item (*ix*) in section 133 (1) of the Civil Procedure Code, which says that the persons mentioned in that sub-section shall be entitled to exemption from personal appearance in Court. According to Article 1 of the Constitution, India is a Union of States and the territory of India shall, according to clause 3 of that Article, comprise the territories of the States, the Union territories specified in the First Schedule and such other territories as may be acquired. This is after the substitution of the original clause (2) of Article 3 by the present clause (2) by the Constitution (Seventh Amendment) Act, 1956, Article 366 (30) of the Constitution defines what a Union territory is, and says :

> " Union territory means any Union territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that schedule."

Entry 6 in Part II of the First Schedule to the Constitution says that Pondicherry is a Union territory and that it comprises "the territories which immediately before the sixteenth day of August, 1962, were comprised in the French Establishments in India known as Pondicherry, Karikal, Mahe and Yanam." Article 367 (1) of the Constitution says :

> " Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372 apply for the interpretation of this Constitution as it aplies for the interpretation of an Act of the Legislature of the Dominion of India."

Article 372 (2) says :

> " For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law."

1. 46 M.L.J. 131 : A.I.R. 1924 Mad. 541.

Article 372-A inserted by the Constitution (Seventh Amendment) Act, 1956, empowers the President to adapt laws and says :

> " (1) For the purposes of bringing the provisions of any law in force in India or in any part thereof immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, into accord with the provisions of this Constitution as amended by that Act, the President may by order made before the 1st day of November, 1957, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law.
>
> (2) Nothing in clause (1) shall be deemed to prevent a competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause."

The General Clauses Act has not been adapted for the interpretation of the Constitution, because Article 367 has not been amended and it has not been laid down that the General Clauses Act, as adapted or modified under any Article other than Article 372 will also apply to the interpretation of the Constitution. Before the 16th day of August, 1962, Pondicherry was comprised in the French Establishments in India known as Pondicherry, Karikal, Mahe and Yanam. Bhargava, J., has observed in *S. K. S. Singh* v. *V. V. Giri*[1], in paragraphs 247 and 248, thus :

> " Article 54, no doubt, lays down that all elected members of the Legislative Assemblies of the States are to be included in the electoral college ; but the word " States " used in this Article cannot include Union Territories. It is true that, under Article 367, the General Clauses Act applies for the interpretation of an Act of the Legislature of the Dominion of India; but that Act has been applied as it stood on 26th January, 1950, when the Constitution came into force, subject only to any adaptations and modifications that may be made therein under Article 372. The General Clauses Act, as it was in 1950 and as adapted or modified under Article 372, did not define " State " so as to include a Union Territory. The Constitution was amended by the Constitution (Seventh Amendment) Act, 1956, which introduced Article 372-A in the Constitution permitting adaptations and modifications of all laws which may be necessary or expedient for the purpose of bringing the provisions of the law into accord with the Constitution as amended by the Seventh Amendment Act, 1956. It was in exercise of this power under Article 372-A that section 3 (58) of the General Clauses Act was amended, so that, thereafter, " States " as defined included Union Territories also. The new definition of " State" in section 3(58) of the General Clauses Act as a result of modifications and adaptations under Article 372-A would, no doubt, apply to the interpretation of all laws of Parliament, but it cannot apply to the interpretation of the Constitution, because Article 367 was not amended and it was not laid down that the General Clauses Act, as adapted or modified under any Article other than Article 372 will also apply to the interpretation of the Constitution. Since, until its amendment in 1956, section 3 (58) of the General Clauses Act did not define, ' State ' as including Union Territories for purposes of interpretation of Article 54, the Union Territories cannot be treated as included in the word ' State'."

The second reason why it must be held that members of Legislatures of Union Territories cannot form part of the electoral college under Article 54 is that that Article confines the electoral college to members of Legislative Assemblies of the States and there are no Legislative Assemblies in the Union Territories. Under Article 168, for every State there is to be a Legislature which shall consist

1. (1970) 2 S.C.J. 768 : A.I.R. 1970 S.C. 2097.

of the Governor, in certain States two Houses, and in some other States one House. The Article further lays down that where there are two Houses of Legislature, one is to be known as the Legislative Council and the other as the Legislative Assembly and, where there is only one House, it is to be known as the Legislative Assembly. On the face of it only members of Houses known as Legislative Assemblies under Article 168 can be members of the Electoral College under Article 54. In the case of Union Territories, the provision for Legislatures is contained in Article 239-A, but that Article does not mention that any House of the Legislature created for any of the Union Territories will be known as a Legislative Assembly. All that that Article lays down is that Parliament may, by law, create a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union Territory. Such a Legislature created

> " by Parliament is not a Legislative Assembly as contemplated by Article 168 or Article 54. Members of Legislatures created for Union Territories under Article 239-A cannot, therefore, be held to be members of Legislative Assemblies of States."

Therefore, the provisions of the Constitution cannot be interpreted in accordance with the General Clauses Act, 1897. In *Advance Insurance Company Limited* v. *Gurudasmal*[1], the learned Judges have held that section 3 (58) (*b*) of the General Clauses Act does not apply to the interpretation of the Constitution and hence the word "State" in Entry 80 of List I cannot be construed to include "Union Territories", relying on the definition of " State " introduced therein by the adaptation of 1956. Therefore, although, under Article 239, save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks, fit, through an administrator to be appointed by him with such designation as he may specify, and, under Article 239-A. Parliament may by law create for any of the Union Territories of Goa, Daman and

1. A.I.R. 1969 Delhi 336.

Diu, Pondicherry and Mizoram, a body whether elected or partly nominated and partly elected, to function as a Legislature for the Unin territory, or a Council of Ministers, or both with such constitution, powers and functions, in each case, as may be specified in the law, there is no distribution of legislative power in the respective Union territories and Parliament has plenary power to legislate for those territories on any subject. Bachawat, J., who spoke for the Bench of the Supreme Court, ir *Kanniyan* v. *Income-tax Officer*[1], has observed in that case, thus :

> " Parliament has plenary power to legislate for the Union territories with regard to ary subject. With regard to Union territories there is no distribution of legislative power. Article 246 (4) enacts that ' Parliament has power to make laws with respect to any matter for any part of "the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List". In *R. K. Sen* v. *Union*[2], it was pointed out that having regard to Article 367, the definition of ' State ' in section 3 (58) of the General Clauses Act, 1897 applies for the interpretation of the Constitution unless there is anything repugnant in the subject or context. Under that definition, the expression 'State' as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956 'shall mean a State specified in the First Schedule to the Constitution and shall include a Union territory'. But this inclusive definition is repugnant to the subject and context of Article 246. There, the expression ' State ' means the States specified in the First Schedule. There is a distribution of legislative power between Parliament and the Legislatures of the States. Exclusive power to legislate with respect to the matters enumerated in the State List is assigned to the Legislatures of the State established by Part VI. There is no distribution of legislative power

1. A.I.R. 1968 S.C. 627.
2. (1966) 1 S.C.R. 430, 433 : A.I.R. 1966 S.C. 644.

with respect to Union territories. That is why Parliament is given power by Article 246 (4) to legislate even with respect to matters enumerated in the State List. If the inclusive definition of 'State' in section 3 (58) of the General Clauses Act were to apply to Article 246 (4), Parliament would have no power to legislate for the Union territories with respect to matters enumerated in the State List and until a Legislature empowered to legislate on those matters is created under Article 239-A for the Union territories, there would be no Legislature competent to legislate on those matters; moreover, for certain territories such as the Andaman and Nicobar Islands no Legislature can be created under Article 239-A, and for such territories there can be no authority competent to legislate with respect to matters enumerated in the State List. Such a construction is repugnant to the subject and context of Article 246. If follows that in view of Article 246 (4), Parliament has plenary powers to make laws for Union territories on all matters."

Union territories are centrally administered by the President acting through an Administrator. The learned author, Dr. V. D. Mahajan, has stated at page 150 of the Fourth Edition of the General Clauses Act, 1897, thus:

"The Seventh Amendment of the Constitution in 1956, abolished Part B and Part C States and divided the territories of India only into two classes *viz.*, territories of the States and the Union Territories. Consequently, the Adaptation of Laws Order, 1956 had to be issued under Article 372-A of the Constitution. However, the adaptations made in the General Clauses Act under Article 372-A were not to apply to the interpretation of the Constitution inasmuch as Article 367 (1) of the Constitution permits the use of the General Clauses Act, as adapted under Article 372 only for such purposes. It follows that the definition of State, as introduced in the General Clauses Act for the first time by the Adaptation of Laws Order, 1956, is not to be used to interpret the word 'State' as used in the Constitution. The existing definition of 'State' in section 3 (58) (*b*) of the General Clauses Act, is not, therefore, to be applied to the interpretation of the Constitution at all for the purposes of the cases before the Court."

Therefore, it has to be found that Pondicherry is not a State according to the Constitution. But, it will fall within the definition of 'State' under section 3 (58) of the General Clauses Act, which reads thus:

"'State'—

(*a*) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State; and

(*b*) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union territory."

According to section 4 of the General Clauses Act, 1897, the definitions in section 3 of that Act apply also, unless there is anything repugnant in the subject or context, to all Acts of the Governor-General in Council made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. The Code of Civil Procedure is a Central Act which received the assent of the Governor-General on the 21st day of March, 1908 and came into force on the first day of January, 1909. Therefore, the provisions of the General Clauses Act, 1897, have to be applied in the interpretation of the Code of Civil Procedure. "Ministers of States", falling in item (*ix*) in section 133 (1) of the Code of Civil Procedure, would, according to section 3 (58) of the General Clauses Act, include the Chief Minister of Pondicherry, a Union territory. Therefore, the petitioner could claim exemption under section 133 of the Civil Procedure Code.

7. The view of the learned District Munsif that the petitioner could claim the exemption under section 133 of the Civil Procedure Code only if he had sued in respect of anything done in his official capacity, cannot be accepted. There is nothing in that section to warrant such

an inference and it is not open to the learned District Munsif to read more than what is contained in the section which says that "Ministers of States" shall be entitled to exemption from personal appearance in Court. Therefore, I find that the petitioner, as Chief Minister of Pondicherry, is entitled to claim the exemption under section 133 and could claim the privilege of being examined on commission in the present case where he has been sued for something alleged to have been done by him in his personal and individual capacity, and he is only bound by clause (3) of that section to pay the costs of the Commission.

8. The petitioner can claim exemption from personal appearance in Court, but not claim to be examined in his own house. Having regard to the present status of the petitioner and what has happened *viz.*, the institution of the suit in the District Munsif's Court, Ramanathapuram, and the opposition to the petitioner's application for examination on commission, I think that the respondent and his Counsel will not feel quite free to cross-examine the petitioner if he is examined on commission in his own house. In the interests of justice, I think it will be desirable to have the petitioner examined at some other place in any one of the Travellers Bungalows or Circuit Houses, if any, in the Pondicherry Union Territory. He will be examined accordingly.

9. The respondent apprehends danger to the person of himself and that of his Counsel if they were to go to Pondicherry for the examination of the petitioner on commission. The apprehension may not be well-founded. However, if the petitioner, a man of importance and status, should feel, as it is hoped that he will do, that the respondent should not have any apprehension at all, he may have himself examined on commission in the Inspection Bungalow, Nagapattinam, which is very close to the border of the Union territory of Pondicherry.

10. The petition is allowed accordingly with costs. The lower Court's order is set aside. The petitioner should deposit a sum of Rs. 200 towards Commissioner's fees into the lower Court within a month from this date, failing which the petition will stand dismissed with costs. As soon as the deposit is made, the lower Court will appoint a suitable advocate as Commissioner and fix a date and venue for the examination of the petitioner as aforesaid in consultation with the learned Counsel for the parties.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

M/s. Mithuna Industries by its Partner, Sharad Vasanji, No. 44/46, Wood Wharf, Wall Tax Road, Madras-1 .. *Petitioner**

v.

The Deputy Chief Controller of Imports and Exports. 11.6.860 Red Hills, Hyderabad-4, Andhra Pradesh and another .. *Respondents.*

Imports (Control) Order (1955)—Clause (9)—Scope—Refers to only import licences—Does not include release order or allotment through canalised agencies.

The various clauses of the Import Control Order (1955), maintain a clear distinction between an order of allotment and an import license. Clause 9 deals only with an import license and it does not empower the cancellation of a release order. [*Para.* 9.]

In view of the clear and continuous distinction that has been maintained by the Imports (Control) Order, 1955 between a licence and an order of allotment which was the same as the release order in the present case under the various provisions of the Order, the Deputy Controller of Imports and Exports had no jurisdiction to cancel the release order issued to the petitioner. [*Para.* 10.]

An import lience authorises a licensee to bring into India goods from abroad for the first time. On the other hand an order of allotment or a release order enables the person in whose favour such an order has been issued to obtain goods

* W. P. Nos. 3379 and 3394 of 1972.
10*th October*, 1973.

already imported into India by canalised or centralised agency like the Minerals and Metals Trading Corporation or the State Trading Corporation as the case may be. [*Para.* 9.]

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a (1) a writ of *mandamus* directing the second respondent to deliver a quantity of 22305.71 kgs. of stainless steel sheets of 0.914 mm. to 0.457 mm. both inclusive, allotted to the petitioner under the release order, dated 14th February, 1972 and made in No. P/L/R/720648/W/33.34, at the price prevailing in March, April 1972 (W.P. No. 3379 of 1972) (2) a writ of prohibition prohibiting the first respondent therein from taking any action or proceeding pursuant to his show cause notice No. Dc/Hyd/261/Enf./71.72, dated 1st December, 1972 (W.P. No. 3394 of 1972).

K. K. Venugopal for *P. Chidambaram*, for Petitioner.

R. Tyagarajan for *K. Parasaran* and *G. Narayanan*, for Respondents.

The Court made the following

ORDER.—The petitioner in these two writ petitions is one and the same and it is a partnership firm. One Messrs. Delta Enterprises, Kakinada, a registered merchant-exporter, who was exporting stainless steel goods, applied for a replenishment licence release order under the registered Exporter's Policy for the quarter July-September, 1971 against their exports of stainless steel utensils for an F.O.B. value of Rs. 2,58,500-30. It is necessary at this stage to explain the scheme under which this application was made. In order to offer incentives to exporters, the Government of India promulgated a scheme by way of granting import licences for raw materials for the manufacture of the goods to be exported, at a particular percentage of the value of the export. It is on the basis of this alone, that an application was made by Messrs. Delta Enterprises, Kakinada. It is also necessary to explain the difference between an import licence and a release order. As an incentive, an exporter is given an import licence to import goods into this country. However, in the case of certain goods, whose import is made by canalising through a particular agency like the Minerals and Metals Trading Corporation of India or the State Trading Corporation of India, instead of granting an import licence, the scheme provided for the grant of a release order or an order of allotment so that the exporter in question can get the quantities of the imported goods from the canalised agencies, namely, the Minerals and Metals Trading Corporation of India or the State Trading Corporation of India as the case may be. As far as stainless steel sheets are concerned, the canalised importing agency is the Minerals and Metals Trading Corporation of India, the second respondent in both the writ petitions. It is not in controversy that the scheme promulgated by the Government in this behalf also provided for an exporter, who is entitled to a replenishment licence, to nominate another in his place, subject to certain conditions, enabling the said nominees to receive the licence or the release order, as the case may be. It is the common case of the parties that in the present case Messrs. Delta Enterprises, Kakinada, the exporters, filed the application for a release order nominating the petitioner herein as their nominee. That application was in two parts, one part to be completed by the exporter himself and the other part to be completed by the nominee. Again, it is admitted that such an application completed in both parts by Messrs. Delta Enterprises, Kakinada, as well as the petitioner, was filed in the present case. Pursuant to this application, a release order was actually issued by the first respondent herein. The said release order bears the No. P/L/R/720648/W/33-34 and it is, dated 14th February, 1972. This order states that the petitioner could approach the Minerals and Metals Trading Corporation for obtaining the allotment of the goods mentioned therein, namely :

S.No.	*Description of goods.*	*Quantity Limit, if any.*	*c.i.f. value in figures and words. Rs.*
	Stainless steel sheets of 0.914 mm. to 0.457 mm. both inclusive.	22305.71 kg.	Rs. 1,88,405 (Rupees one lakh eighty eight thousand four hundred and five only).

It contains certain other conditions also, one of them being that the release order should be produced in original to the Minerals and Metals Trading Corporation of India Limited, Madras. It also mentions that the release order will be valid for six months from the date of issue. This release order was sent to the petitioner under a covering letter, dated 16th February, 1972. On receipt of the release order, the petitioner wrote to the Minerals and Metals Trading Corporation Limited, Madras, on 15th March, 1972 requesting delivery of the goods immediately on priority basis. Not having received any reply, the petitioner wrote a reminder on 5th June, 1972. To that also the petitioner did not receive any reply from the second respondent herein. However, the petitioner received a communication, dated 27th July, 1972 from the office of the first respondent herein, signed by the Controller of Imports and Exports. This communication drew the attention of the petitioner to the issue of the release order for stainless steel sheets and stated :

> " The exporters M/s. Delta Enterprises, Kakinada, while claiming export benefits did not produce attested copies of shipping bills but instead submitted certified copies only. These shipping bills do not indicate whether the exported products were made out of sheet or scrap. Items exported include karandi, tumblers, etc., which are generally made from scrap by castings. Further, registration certificate produced by you did not say that you were actually engaged in the manufacture of stainless steel utensils etc. In these circumstances, the issue of the Release Order No. P/L/R/720648, dated 14th February, 1972 is viewed as not in order.
>
> You are therefore requested to return the Release Order No. P/L/R/720648, dated 14th February, 1972 without entering into any commitment."

Admittedly, to this communication, the petitioner did not submit any reply. Subsequently the petitioner issued a notice through Counsel to the second respondent on 16th September, 1972 calling upon the second respondent to deliver the allotted goods within 15 days of receipt of the notice. The second respondent by reply dated 19th September, 1972, stated that it was examining the matter and would write in due course. This was followed up by another letter, dated 29th September, 1972 stating that the matter was still under correspondence with the licensing authority. The petitioner thereafter sent a telegram and a letter to the second respondent in November, 1972, but did not receive any reply by the time the writ petitions were filed. While so, a notice dated, 1st December, 1972 was received by the petitioner from the first respondent herein. This notice called upon the petitioner to show cause why the release order referred to already should not be cancelled under clause 9 (*a*) of the Imports (Control) Order, 1955, and gave 15 days' time for showing cause and also fixed 3.00 P.M. on 16th December, 1972, for any personal hearing, if the petitioner so desired. In addition to repeating what the Controller of Imports and Exports had stated by his communication, dated 27th July, 1972, this notice put forward two other grounds for showing that the release order was not in order. One was that information had been received that the exporters Messrs. Delta Enterprises, Kakinada, had highly inflated the weight of the goods exported in the export invoices to obtain the incentive import licence under the REP Scheme for

higher value than what they would have been normally entitled to. The second was, that the Central Bank of India Limited, Kakinada, had confirmed that payments against the exports made by the exporters M/s. Delta Enterprises, Kakinada, had not been realised. It is after the receipt of this notice that these two petitions were filed by the petitioner herein.

3. In W.P. No. 3394 of 1972, the petitioner has prayed for a writ of prohibition prohibiting the first respondent therein from taking any action or proceeding pursuant to his show-cause notice, dated 1st December, 1972. In W.P. No. 3379 of 1972, the petitioner has prayed for a writ of *mandamus* or any other appropriate writ, order, or direction directing the second respondent therein to deliver a quantity of 22305.71 Kgs. of stainless steel sheets of 0.914 mm. to 0.457 mm., both inclusive, allotted to the petitioner under the release order, dated 14th February, 1972 at the price prevailing in March-April, 1972.

4. The petitioner in the affidavits filed in support of the respective writ petitions has contended that the first respondent had no jurisdiction to cancel the release order already granted to the petitioner, that the various grounds in support of the proposed action mentioned in the notice were not really true and that as a matter of fact, the first respondent was estopped from proceeding to take the action in question, namely, cancelling the release order already issued to the petitioner. With regard to W.P. No. 3379 of 1972, the case of the petitioner is that after it received the release order, it immediately approached the second respondent for delivery of the quantity of stainless steel sheets covered by the release order, that even though the second respondent had delivered stainless steel sheets to other persons to whom similar release orders had been issued, it had not delivered the quantity of stainless steel to the petitioner herein and that the second respondent is bound to honour the release order and deliver the stainless steel sheets in question.

5. An elaborate counter-affidavit has been filed by the first respondent in W.P. No. 3394 of 1972. This counter-affidavit in detail sets out the scheme under which the application was made and the release order was granted and contends that Messrs. Delta Enterprises, Kakinada, were not really *bona fide* exporters, that as a matter of fact such an exporter did not really exist, that consequently the entire export was a fictitious one, that the amounts for which goods were exported had not been repatriated into this country, as required by the rules within a period of six months, that therefore the release order being in the nature of an incentive to earn foreign exchange and no foreign exchange having been earned in the present case, the release order was not valid in law and that therefore the first respondent was justified in proposing to take action to cancel the said release order. Out of the several grounds mentioned in the communication, dated 27th July, 1972 as well as the notice, dated 1st December, 1972, the first respondent in the counter-affidavit confined himself only to two grounds, namely, (1) the failure on the part of the exporters, Messrs. Delta Enterprises, Kakinada, to repatriate the amount covered by the export into India ; and (2) the inflation of the value of the export alleged against the exporters, namely, Messrs. Delta Enterprises, Kakinada. Having regard to the rival contentions put forward by the parties in the present case and having regard to the nature of the relief prayed for in W.P. No. 3394 of 1972, the question for consideration is, whether the first respondent had jurisdiction to cancel the release order already issued by him to the petitioner herein pursuant to the power claimed by him under clause 9 of the Imports (Control) Order, 1955.

6. Mr. K. K. Venugopal, learned Counsel for the petitioner, put forward two contentions before me in support of W.P. No. 3394 of 1972. The first contention is that even assuming that every one of the allegations made by the first respondent is true, still the first respondent had no jurisdiction to cancel the release order already issued to the petitioner, because clause 9 of the Imports (Control) Order, 1955 deals with cancellation of only an import licence and does not deal with cancellation of a release order like the present one. The second argument is that even assuming that the first respon-

dent had power or authority under clause 9 to cancel the release order and further assuming that all the allegations made by the first respondent in the notice, dated 1st December, 1972 are true, still the first respondent will have no authority to cancel the release order, because he is estopped from doing so by virtue of his holding out earlier that Messrs. Delta Enterprises had made the export in question and therefore were entitled to the release order in question and that relying upon that representation made by the first respondent, the petitioner herein had parted with a sum of Rs. 2,02,981-96 in favour of Messrs. Delta Enterprise, by way of premium. I shall now consider the validity of these submissions.

7. Let me take the first submission immediately. It is necessary in this context to refer to the provisions contained in the Imports and Exports (Control) Act, 1947, as well as the Imports (Control) Order, 1955. Section 3 (1) of the Imports and Exports (Control) Act, 1947, provides that "the Central Government may, by order published in the Official Gazette, make provisions for prohibiting, restricting, or otherwise controlling in all cases or in specified classes of cases, and subject to such exceptions if any as may be made by or under the order:

"(*a*) the import, export, carriage coastwise or shipment as ships stores of goods of any specified description;

(*b*) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried."

Sub-section (2) of section 3 provides that all goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited under section 11 of the Customs Act, 1962; and all the provisions of that Act shall have effect accordingly. Sub-section (3) of section 3 contemplates that notwithstanding anything contained in the Customs Act, the Central Government may, by order published in the Official Gazette, prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment abroad of any goods or class of goods imported into India.

8. Pursuant to the powers conferred on the Government by section 3 of the Act, the Central Government, had promulgated the Imports (Control) Order, 1955. Clause 2 of this Order defines certain expressions used in the Order and one such expression is, "application for licence" which has been defined as including any application made under the Import Trade Control Regulations. The expression, "licence" itself has been defined as to include a customs clearance permit issued under the said Order. Clause 3 of this Order states that save as otherwise provided in the Order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance, with a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II. Clause 4 deals with fees on application for licences. Clause 5 deals with conditions of licences. Clause 6 deals with refusal of licence. Clause 7 deals with amendment of licence. Clause 8 is important and it states:

"The Central Government or the Chief Controller of Imports and Exports may debar a licensee or importer or any other person from receiving licences or allotment of imported goods through the State Trading Corporation of India, the Minerals and Metals Trading Corporation of India, or any other similar agency, and direct, without prejudice to any other action that may be taken against him in this behalf, that no licence or allotment of imported goods shall be granted to him for a specified period under this Order."

9. It is not necessary for the purpose of this case to refer to the various contingencies enumerated in clause 8 in which the power can be exercised. Clause 8-A provides:

"The Central Government or the Chief Controller of Imports and Exports may suspend the grant of licences or allotments of imported goods through the State Trading Corporation of India, the Minerals and Metals Trading

Corporation of India, or any other similar agency, to a licensee of importer or any other person, pending investigation into one or more of the allegations mentioned in clause 8, without prejudice to any other action that may be taken against him in this behalf :

Provided that grant of a licence or allotment of imported goods shall not ordinarily be suspended under this clause for a period exceeding twelve months :

Provided further that on the withdrawal of such suspension, a licence or allotment of imported goods may be granted to him for the period of suspension subject to such conditions, restrictions, or limitations as may be decided by the authority aforesaid, keeping in view the foreign exchange position, indigenous production and other relevant factors."

Clause 8-B confers power on the Government to keep in abeyance application for licences or allotments of imported goods. Clause 8-C deals with publicity of action taken under clause 8 or 8-A. Clause 9 is the most important clause as far as the present case is concerned and the same is as follows :

"The Central Government or the Chief Controller of Imports and Exports or any other officer authorised in this behalf may cancel any licence granted under this Order or otherwise render it ineffective :

(*a*) if the licence has been granted through inadvertence or mistake or has been obtained by fraud or misrepresentation ;

(*b*) if the licence has been granted contrary to rules or the provisions of this Order ;

(*c*) if the licensee has committed a breach of any of the conditions of a licence ;

(*cc*) if the Central Government or such officer is satisfied that the licence will not serve the purpose for which it has been granted ;

(*d*) if the licensee has committed a breach of any law relating to customs or the rules and regulations relating to the import or export of goods or of any law relating to the regulations of foreign exchange."

The argument of Mr. Venugopal, learned Counsel for the petitioner, based on these statutory provisions, is this. Clause 9, when it deals with cancellation of a licence, refers to import licence contemplated by the Imports and Exports Control Act, 1947, and does not take in a release order which is really an allotment as in the present case. As a matter of fact, the argument of the learned Counsel that the release order is only an allotment as contemplated by clauses 8, 8-A, 8-B is made clear by the release order itself which states :

"With reference to your application/letter No. dated 7th December, 1971 on the above subject, I write to say that you may approach the Minerals and Metals Trading Corporation for obtaining the allotment of the goods mentioned below."

Consequently, the release order in the present case is nothing but an order of allotment referred to and dealt with in clauses 8, 8-A and 8-B. The contention of Mr. Venugopal is that the Imports (Control) Order, 1955, makes a clear distinction between an import licence and an order of allotment, namely, the release order and clause 9 applies only to a licence and not to a release order and therefore the first respondent herein had no jurisdiction to cancel the release order issued to the petitioner under clause 9, as he purports to have done, and consequently he must be prohibited from doing so by the issue of a writ of prohibition. In my opinion, this argument of the learned Counsel for the petitioner is well-founded. I am clearly of the opinion that the various clauses of the Imports (Control) Order, 1955, maintain a clear distinction between an order of allotment and an import licence and clause 9 deals only with an import licence. The distinction is obvious from another point of view also. An import licence authorises a licensee to bring into India goods from abroad for the first time. On the other hand, an order of allotment or a release order enables the person in whose favour such an order has been issued to obtain goods

already imported into India by a canalised or centralised agency like the Minerals and Metals Trading Corporation or the State Trading Corporation as the case may be. Therefore, merely as a construction of the language of the various clauses of the Imports (Control) Order, 1955, I have no hesitation in coming to the conclusion that clause 9 under which alone the first respondent has purported to act has no application to the release order in question.

10. It is relevant in this context to refer to a specific statement made by the first respondent in paragraph 35 (*c*) of the counter-affidavit filed by him. In this paragraph he has categorically stated that he, the first respondent, is not contemplating any departmental action against the petitioner under clauses 8, 8-A and 8-B and that the show-cause notice was issued under clause 9 of Imports (Control) Order, dated 7th December, 1955 as amended, for cancellation of the release order issued to the petitioner herein. Since a writ of prohibition is concerned only with the jurisdiction of the authority concerned, even though the first respondent did not have any jurisdiction to cancel the release order under clause 9, I asked the learned Counsel appearing for the first respondent to show whether any other provision of the Imports (Control) Order, 1955 or any other provision contained in the Import Trade Control Hand Book of Rules and Procedure or any scheme promulgated by the Government of India enables the first respondent to cancel the release order in the present case. The learned Counsel frankly conceded that apart from clause 9 of the Imports (Control) Order, 1955, he was not relying on any other provision, either statutory or otherwise, for seeking to have the release order cancelled. The only argument that was put forward on behalf of the first respondent which was stated in the counter-affidavit and repeated before me is this. Paragraph 41 of section 1, Part B of the Import Trade Control Policy Volume II for 1971-72, provides that "where a registered exporter or his nominee is eligible for a licence under the Import Policy for Registered Exporters, for an item, the import of which is canalised through a public sector agency in terms of the current import policy, the licensing authority will issue 'REP release order' in respect of such an item, instead of issuing REP licence. The 'REP release order' will make it possible for the registered exporter or his nominee, as the case may be, to obtain his requirements according to the release order from the canalising agency at the international price plus reasonable incidental charges." Based on this provision, the contention as put forward in paragraph 23 of the counter-affidavit is that though clause 9 of the Imports (Control) Order, 1955 speaks of cancellation of licence, it includes in its purview the release order also inasmuch as release orders are permits issued only in lieu of licences in respect of items canalised through the public sector agencies like the State Trading Corporation of India Limited, Minerals and Metals Trading Corporation of India Limited, etc., in terms of paragraph 97 of Import Trade Control Hand Book of Rules and Procedure 1971 and also in terms of paragraph 41, Part B, section 1 of Import Trade Control Policy Book for April, 1971 ; March, 1972 Volume II. It is further contended in this paragraph that "it is relevant to emphasise that against such release orders only imported raw materials are supplied. In other words the foreign exchange expenditure is the same both in respect of licences and Release Orders. Since Release Orders are only substitutes for Import licences for supply of imported raw materials, clause 9 of the Imports (Control) Order could be invoked for cancellation of such Release Orders." The same contention is reiterated in paragraph 33 of the counter-affidavit wherein it is contended :

> "It is clear therefore that a release Order is nothing but a substitute for the licence for obtaining imported raw materials. In other words both licence and Release Order are permits ; while licence permits direct imports by the parties concerned, Release Order is a permit for obtaining the imported raw materials indigenously through the selected public sector Agencies like the State Trading Corporation of India Limited, Minerals and Metals Trading Corporation of India Limited, etc. In accordance with the accepted policy of the Government to increasingly

canalise the import trade, certain raw materials are imported by the public sector Agencies selected for this purpose. These imported raw materials are distributed within the country to the persons holding valid Release Orders by the Public Sector Agencies who are granted the necessary foreign exchange by the Government for import of such raw materials. Hence as already averred in paragraph 11, the foreign exchange expenditure is the same whether the parties are granted the licence to import raw materials directly or given the Release Order to procure raw materials from the Public Sector Agencies who import them."

It is unnecessary to refer to paragraph 34 of the counter-affidavit which also merely repeats the above contention. I am clearly of the opinion that this contention of the first respondent is unsustainable in view of the clear and continuous distinction that has been maintained by the Imports (Control) Order, 1955 between a licence and an order of allotment, which is the same as the release order in the present case, under the various provisions of the Order. Consequently, I hold that the first respondent has no jurisdiction to cancel the release order issued to the petitioner in exercise of the powers conferred on him by clause 9 of the Imports (Control) Order, 1955.

11. As far as the second submission of the learned Counsel for the petitioner is concerned, as I have already pointed out, it proceeds on the basis that even assuming that the first respondent had jurisdiction to cancel the release order under clause 9 of the Imports (Control) Order, 1955 and further assuming that every one of the allegations made by the first respondent in the notice, dated 1st December, 1972 is true, still the first respondent cannot cancel the release order, as he is estopped from doing so. I am unable to accept this contention of the learned Counsel. I have already extracted the provisions of clause 9 of the Imports (Control) Order, 1955. One of the grounds on which a licence could be cancelled under the clause is that the licence had been granted through inadvertence or mistake. Once the authority has got a right to cancel a licence on the ground that it had been granted through inadvertence or mistake, it is certainly not open to a person like the petitioner to contend that the authority cannot exercise that power, because the said authority itself had earlier proceeded on the basis that the exporter was validly entitled to the release order and that consequently the nominee himself was entitled to such a release order. The very provision for cancellation of a licence granted through inadvertence or mistake bars any such contention in this behalf. So long as that provision is a statutory one, it is not open to a person like the petitioner to put forward the contention based upon estoppel, because there cannot be estoppel against law. Hence, I am unable to sustain the second contention of the learned Counsel for the petitioner.

12. It has been repeatedly pointed out in the counter-affidavit by the first respondent herein that the nation has lost valuable foreign exchange, because Messrs Delta Enterprises, Kakinada, had not repatriated the amount for which goods were exported and that consequently to compel the Government to sustain the release order already issued in favour of the petitioner would lead to national loss in the form of foreign exchange. If any such thing has happened, the first respondent alone has to thank himself for the same. It is contended again and again in the counter-affidavit that Messrs. Delta Enterprises had not repatriated foreign exchange to the extent of seven lakhs of rupees in this case and that the nation has lost foreign exchange to that extent, and that at the same time, the first respondent had been compelled to give release order to the petitioner herein. It is mentioned that under the relevant regulations, an exporter is bound to repatriate foreign exchange covering the value of the export within a period of six months from the date of the export and that the exporter in the present case has not done so. In the present case, as admitted by the first respondent himself in paragraph 24 of the counter-affidavit, the exports relevant for the release order in question were covered by MAC 772286, MAC 772278, MAC 772279 and MAC 772287 involving foreign exchange to the extent of Rs. 2,62,867.86. It is represented that these exports took place in July, 1971. The

release order in question was issued on 14th February, 1972. That means, by the time the release order was issued, the period of six months prescribed for repatriation of the foreign exchange had expired. Notwithstanding this, if the first respondent had chosen to issue the release order without verifying whether the foreign exchange had been repatriated or not, it is certainly not open to him now to contend that it will be a ground for him to cancel the release order issued to the petitioner herein. Again in paragraph 33 of the counter-affidavit, the first respondent states :

> "In this connection it is respectfully submitted that the exporter Messrs. Delta Enterprises, Kakinada, has always been in the habit of nominating some third parties for receiving the benefit of replenishment licences against his own exports. And it is understood from the Reserve Bank of India that in all these cases, the export proceeds (foreign exchange earnings) amounting to nearly 7 lakhs are outstanding. In other words, while the exporter managed to get the licence/Release Orders transferred to his nominee, he has failed to repatriate the corresponding foreign exchange to the tune of 7 lakhs against the relevant exports. It is therefore evident that in each and every case he has deliberately nominated third parties for obtaining replenishment licences with the intention of defrauding the Government of the valuable foreign exchange and escaping his own responsibility in the matter."

With the knowledge that the exporter in the present case, namely, Messrs. Delta Enterprises, Kakinada, was always in the habit of nominating some third parties for receiving the benefit of replenishment licences, if the first respondent had chosen to grant a release order to the petitioner, namely, the nominee of Messrs. Delta Enterprises, Kakinada, certainly it is not open to him now to bemoan the consequence and contend that the petitioner will have to lose the release order for the fault committed by the first respondent himself. It is very unfortunate and extremely regrettable that in this particular case not only the country has lost valuable foreign exchange to the extent of rupees seven lakhs, but the petitioner herein is also enabled to get huge quantity of imported materials, thereby the country losing at both the ends. But that is certainly attributable only to the policy that had been pursued and followed by the first respondent and his superiors without taking adequate precaution for the purpose of assuring that the foreign exchange referable to the export had actually been repatriated into the country and that thereby the incentive import licence really worked as an incentive to export and earn valuable foreign exchange and not worked to the detriment of the country.

13. In any event the considerations referred to above which are matters of policy for the Government to decide, do not have any bearing on the present question, namely, whether the first respondent has jurisdiction or not to cancel the release order granted to the petitioner herein under clause 9 of the Imports (Control) Order, 1955. I have already held that the first respondent has no such jurisdiction.

14. The learned Counsel for the first respondent sought to contend before me that the release order issued to the petitioner herein was valid only for a period of six months, that since the period of six months had already expired, it does not continue to be valid and that therefore no purpose would be served by issuing a writ of prohibition. I am unable to accept this contention. I have already referred to the fact that after the receipt of the release order in February, 1972, the petitioner wrote to the second respondent on 15th March, 1972 and 5th June, 1972 calling upon the second respondent to deliver the stainless steel sheets. It is only the second respondent who did not deliver the same on instructions from the first respondent herein. Therefore, it is not open to respondents 1 and 2 herein to take advantage of their own wrong and to contend that the release order has ceased to be valid and therefore no writ of prohibition can be issued.

15. The result is, W.P. No. 3394 of 1972 is allowed and a writ of prohibition as prayed for will issue. There will be no order as to costs.

W.P. No. 3379 *of* 1972.—As I have pointed out already, this writ petition prays for the issue of a writ of *mandamus* to the second respondent herein. However, the learned Counsel for the petitioner and the learned Counsel for the second respondent had agreed among themselves that in the event of the writ of prohibition being issued against the first respondent in W.P. No. 3394 of 1972 and the release order, dated 14th February, 1972 being held valid, the second respondent herein has no objection to sell that quantity of stainless steel sheets to which the petitioner would have been entitled if delivery had been effected in March, 1972, by a sale note to be issued now at the price fixed for the quarter October-December, 1973 and that the sale note will be issued and delivery will be effected within two weeks from the date of the judgment. In view of this agreement between the parties and in view of the fact that I have issued a writ of prohibition in W.P. No. 3394 of 1972 and rejected the contention of the first respondent that the release order has ceased to be valid, the learned Counsel for the petitioner, does not press the relief for the issue of a writ of *mandamus*. Accordingly W.P. No. 3379 of 1972 is dismissed on that basis. There will be no order as to costs.

P.S.P. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—*P. S. Kailasam and S. Maharajan, JJ.*

Kandaswami Mudaliar .. *Appellant**

v

Munuswamy Udayar and others .. *Respondents.*

(A) *Contract Act* (*IX of* 1872), *section* 55—*Agreement to convey immovable property—Time if essence of contract.*

In all agreements to convey immovable property usually time is not the essence of contract. [*Para.* 6.]

Held on facts that the transaction in question was an agreement to sell immoveable property simpliciter and not an agreement for reconveyance and hence time was not of essence of the contract in spite of the fact that the agreement provided that if the purchaser failed to pay the amount within the stipulated time the agreement would get not only cancelled but he would also lose the advance and all rights to the property. [*Paras.* 5, 6.]

(B) *Specific Relief Act* (*XLVII of* 1963), *section* 16—*Contract in which time is not of essence —Specific performance of—Readiness and willingness of plaintiff to perform his part —Proof—If should show that he had the necessary funds at all times.*

All that the requirement that before a decree for specific performance could be granted, the plaintiff would have to prove his readiness and willingness continuously from the date of the contract till the date of hearing of the suit, to perform his part of the contract means is that during the course of the continuance of the contract and subsequently the plaintiff must be ready and willing to perform his part of the contract. In other words, the plaintiff will not lose his right to get specific performance merely because had not the necessary funds before the last date provided under the contract but he will not be entitled to specific performance if he was not ready and willing to perform his part of the contract. Thus it is clear that it is not essential that the plaintiff should have money ready in contracts where time is not the essence but should always stand by and be ready and willing to perform his part of the contract. [*Para.* 7.]

Cases referred to :

Jamshed Khodaram Irani v. *Burjorji Dhunjibhai*, I.L.R. (1916) 40 Bom. 289 ; *Gomathinayagam Pillai* v. *Palaniswami Nadar*, (1967) 2 S.C.W.R. 147 : (1967) 1 S.C.R. 227 : A.I.R. 1967 S.C. 868.

Appeal under clause 15 of the Letters Patent against the decree of the Honourable Mr. Justice Venkatadri, dated 28th June, 1967 and passed in S.A. No. 855 of 1963 preferred to the High Court against the decree of the District Court of North Arcot at Vellore in A.S. No. 561 of 1961, preferred against the decree of the Court

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* L.P.A. No. 13 of 1970
in S.A. No. 855 of 1963. *21st November,* 1973.

of the Principal Subordinate Judge, Vellore in O.S. No. 57 of 1960.

M. S. Venkatarama Iyer and *S. Balasubramaniam*, for Appellant.

M. V. Krishnan, for Respondents.

The Judgment of the Court was delivered by

Kailasam, J.—The defendant in the suit is the appellant in this Letters Patent Appeal. The plaintiffs filed the suit for specific performance of an agreement dated 21st August, 1952 executed by the defendant in favour of the plaintiffs for conveyance of certain items of the suit properties. The plaintiffs wanted to purchase one item of property from one Ramaswami. They were unable to raise funds. They approached the defendant and the defendant told the plaintiffs that because of the Debt Relief Act, he would not be in a position to advance money to the plaintiffs at a high rate of interest, but if the plaintiffs agreed, he would advance money on condition that the plaintiffs should convey not only the property that was proposed to be purchased but also the property they owned to the defendant and after such conveyance, the defendant would agree to transfer the property back to the plaintiffs on their paying the entire money with interest stipulated. Accordingly, sale deeds were executed in favour of the defendant by registered documents, dated 29th May, 1950. The defendant agreed to sell the property back to the plaintiffs and executed a registered agreement to sell in favour of the plaintiffs on 21st August, 1952. The agreement provided that the defendant agreed to sell the land to the plaintiffs for Rs. 7,000 and took an advance of Rs. 10 on 21st August, 1952 and agreed that if the plaintiffs paid the balance of Rs. 6,990 at any time before 12th April, 1957 to the defendant, the defendant or his heirs and representatives should execute and register a sale deed in favour of the plaintiffs at their cost. The defendant also agreed that if the plaintiffs paid Rs. 6,990 before 12th April, 1957 and if the defendant or his heirs and representatives failed to execute and register the sale deed in favour of the plaintiffs, the plaintiffs could file a suit for specific performance of the contract of sale. The agreement further provided that if the plaintiffs failed to pay the amount of Rs. 6,990 within 12th April, 1957 the plaintiffs would forfeit the advance paid by them and also forfeit the right to enforce specific performance and the agreement would stand cancelled. It is common ground that the plaintiffs did not pay Rs. 6,990 before 12th April, 1957 but filed the suit on 11th April, 1960 for specific performance. But before filing the suit, they issued a notice saying that they were ready to meet the defendant at the Sub-Registrar's Office, Tirupattur with Rs. 6,990 for taking the sale deed. The defendant repudiated his liability to specifically perform the agreement.

2. The defence taken to the suit was that the transaction was in the nature of an agreement of reconveyance and that time is the essence of the contract and as the plaintiffs had failed to pay the balance of Rs. 6,990 before 12th April, 1957, the plaintiffs could not specifically enforce the contract.

3. The trial Court found that the agreement was an agreement to sell and not an agreement to reconvey and time is not the essence of the contract. It also found that the suit filed by the plaintiffs is within time. In this view, the trial Court decreed the suit. The defendant appealed to the District Judge, North Arcot. In the appeal, the appellate Court considered two questions, namely, whether time is the essence of the contract and whether the suit is barred by time. The appellate Court held that the document Exhibit A-1 is an agreement to reconvey the property and time is the essence of the contract and that as the plaintiffs had failed to pay the money before 12th April, 1957, the time stipulated, the plaintiffs cannot enforce the agreement for specific performance.

4. The plaintiffs took the matter in second appeal to this Court. Venkatadri, J., considered the question whether Exhibit A-1 is an agreement simpliciter to sell the suit property or an agreement for reconveyance of the suit property. The learned Judge came to the conclusion that the agreement is an agreement simpliciter and that it was not an agreement for reconveyance and therefore time is not the essence of the contract and decreed

the plaintiffs' suit. Hence this Letters Patent Appeal.

5. The learned trial Judge in paragraph 10 of his judgment has elaborately gone into the question as to whether the document in an agreement of reconveyance or an agreement of sale simpliciter. He has pointed out that the property was sold by the plaintiffs to the defendant for a total consideration of Rs. 5,500, while the agreement between them stipulated that the plaintiffs should pay Rs. 7,000 to the defendant on or before 12th April, 1957. Apart from the difference in the price, the sale deeds and the agreement to convey are not contemporaneous documents. The sale deeds were executed in 1950 but the agreement to convey was entered into only in 1952. It was in fact not claimed in the written statement by the defendant that the agreement was executed in pursuance of an agreement to reconvey the property. It may also be noted that out of the two properties conveyed to the defendant, one property alone belonged to the plaintiffs and another to one Ramaswami. Both the properties were conveyed in the name of the defendant as security for payment of the money due by the plaintiffs to the defendant. In such circumstances, it cannot be said, that there was any agreement of reconveyance of properties, one belonging to a stranger and another to the plaintiffs. It was an agreement entered into two years after the execution of the sale deed wherein the defendant agreed to sell the property. Taking all these facts into account, we agree with the trial Court and the learned Judge who heard the second appeal that the transaction was an agreement to sell simpliciter and not an agreement for reconveyance.

6. In all the agreements to convey immoveable property, usually time is not the essence of contract. The question has been elaborately dealt with by the Privy Council in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai*[1], In that case the contract provided that should the purchaser not pay the amount within the fixed period mentioned in it he was to have no right to the deposit or earnest money paid on account and any claim of his was to be void, and the vendor was, after that date, to be at liberty to re-sell. In spite of such a specific clause the Privy Council held, after referring to section 55 of the Indian Contract Act, 1872 that the law of equity which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. Their Lordships observed :

> "But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakeable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified."

In this case, Mr. M.S. Venkatarama Iyer, strongly relied on the provision in the agreement that if the plaintiff failed to pay the amount, the agreement not only gets cancelled, but also he would stand to lose the advance amount and shall be deemed to have lost all rights in the property. This clause in the agreement is more or less similar to the one that was dealt with by the Privy Council in *Jamshed Khodaram Irani* v. *Burjorji Dhunibhai*[1], and that decision is on all fours and is applicable to the facts of this case. We therefore consider that time is not the essence of the contract.

7. In this Letters Patent Appeal Mr. M.S. Venkatarama Iyer, submitted that the Courts below lost sight of the essential condition that is necessary to enable the plaintiffs to succeed in a suit for specific

1. (1916) I.L.R. 40 Bom. 289.

1. (1916) I. L. R. 40 Bom. 289.

performance, namely, that the plaintiff, should aver and prove that they were always willing and ready to perform their part of the contract. According to the learned Counsel, as in their notice the plaintiffs had stated that they were unable to find money till 12th April, 1957, the period stipulated under the agreement, it must be held that they were not ready and willing to perform their part of the contract and they were not entitled to a decree for specific performance. This plea was not taken in the trial Court. The trial Court decreed the suit and the defendant preferred an appeal. Even in the memorandum of appeal grounds, this ground was not raised. But being a question of law we allowed the learned Counsel to raise this point. In support of his contention the learned Counsel relied on the decision of the Supreme Court in *Gomathinayagam Pillai* v. *Palaniswami Nadar*[1]. He submitted relying on paragraph 10 of the judgment that before a decree for specific performance could be granted, the plaintiff would have to prove his readiness and willingness continuously from the date of the contract till the date of hearing of the suit and if he failed in that his suit was liable to fail. Learned Counsel would construe this observation as meaning that the plaintiff should be ready and willing to perform his part of the contract by keeping the money ready to be paid to the defendant. We are unable to accept the interpretation put upon the sentence of the judgment of the Supreme Court by the learned Counsel. All that it means is that during the course of the continuance of the contract and subsequently the plaintiff must be ready and willing to perform his part of the contract. Section 16 of the Specific Relief Act (XLVII of 1963) provides that specific performance of a contract cannot be enforced in favour of persons specified in clause (*a*) (*b*) and (*c*) of that section. Sub-section (*b*) provides that specific performance cannot be had in favour of a person who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of the relation intended to be established by the contract. The sum and substance of sub-clause (*b*) is that the plaintiff should continue to stand by the contract and should not have become incapable of performing the contract or violated any of the terms of the contract. Sub-section (*c*) provides that the plaintiff should aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. This position is made clear by the Supreme Court in the latter part of the paragraph wherein it states:

> "A ground for rejecting the respondent's claim for specific performance will not arise merely because the respondent was not ready with the necessary funds on 30th April, 1959, if time was not of the essence."

The above sentence makes it abundantly clear that the plaintiff will not lose his right to get specific performance merely because he had not the necessary funds before the last date provided under the contract but he will not be entiled to specific performance "is the respondent was not ready and willing to perform his part of the contract." Thus it is clear that it is not essential that the plaintiff should have money ready in contracts where time is not the essence but should always stand by and be ready and willing to perform his part of the contract. We are unable to agree with the submission of the learned Counsel that the decision of the Supreme Court in *Gomathinayagam Pillai* v. *Palaniswami Nadar*[1], would negative the claim of the plaintiff for specific performance.

8. The learned Counsel submitted that in any event the burden is on the plaintiffs to prove that they were always ready and willing to perform the contract and that this has not been proved as no oral evidence has been let in. This point was not specifically raised or put in issue in either the trial Court or the appellate Court or even before the learned Judge who heard the second appeal. As a matter of fact, on the materials available, we are

1. (1967) 2 S.C.W.R. 147 : (1967) 1 S.C.R. 227 : A.I.R. 1967 S.C. 868.

1. (1967) 2 S.C.W.R. 147: (1967) 1 S.C.R. 227 : A.I.R. 1967 S.C. 868.

satisfied that the plaintiffs were always ready and willing to perform their part of the contract. They wanted really to get back the property.

9. In the result, we do not see any reason for not accepting the conclusion arrived at by the learned Judge. The Letters Patent Appeal is dismissed with costs.

V.K. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—T. *Ramaprasada Rao, J.*

Sarojini Ammal .. *Petitioner**

v.

K. Chelliah Pillai and another .. *Respondents.*

Madras Cultivating Tenants Protection Act (XXV of 1955), *section* 2 (aa)—*Cultivating tenant—Test—Cannot include a person having interest in land falling short of right as lessee—Constitution of India* (1950), *Article* 226.

A person projecting an interest as a "cultivating tenant" within the meaning of section 2 (*aa*) of the Madras Cultivating Tenants Protection Act, should prove and establish that he has an interest in the land which is the subject-matter of the enquiry. [*Para.* 3.]

"The land" which has been leased out should be decipherable or identifiable and capable of being specified as the subject-matter of demise and such a land must be cultivated by the tenant. [*Para.* 4.]

Where the parties had agreed to have mixed crops in the land of the petitioner in the sense that both could cultivate on the same land the petitioner raising coffee and fruit bearing trees and the respondent raising within the available space in the land banana trees, and there was no possibility to demarcate or define the land on which the first respondent could plant banana trees and enjoy the usufructs therefrom, the latter cannot get relief or recognition as a cultivating tenant under section 2 (*aa*) of the Act. [*Para.* 6.]

Cases referred to:—

Muthuraja v. *Rajarathinam*, (1960) 2 M.L.J. 475: I.L.R. (1960) Mad. 826; *Arumutha Vettian* v. *Angamuthu Nattar*, (1965) 1 M.L.J. 170; *Govindaswami* v. *Mahalakshmi Ammal*, (1963) 2 M.L.J. 137.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the second respondent relating to the proceedings dated 15th January, 1973 in A10/RP/20/72 and quash the proceedings of the 2nd respondent dated 15th January, 1973.

R. Krishnamoorthy, D. Raju and *A.R. Lakshmanan*, for Petitioner.

A. Varadarajan, S. Ramalingam and *T. Sathiadev*, for Respondents.

The Court made the following

ORDER:—Under an agreement dated 17th November, 1966, the petitioner and the first respondent agreed that the first respondent could enter upon her land of an extent of about 11 acres in Uthamapalayam, Madurai and that whilst she be enabled to raise coffee, orange, pomegranates etc., crops in the same land, the first respondent would equally be permitted to plant banana trees and enjoy the usufructs therefrom. It is also in the contemplation of parties what whilst the first respondent enters the land for purposes of enjoying the usufructs of the banana crop raised by him, he should not in any way disturb the other crops which the petitioner might raise in the very same land. Almost at the end of the period provided for under the arrangement as above, the first respondent apparently intended to get a permanent right in himself under the Madras Cultivating Tenants' Protection Act and with that object in view, he applied to the Record Officer, Periakulam requesting him to record him as a cultivating tenant of the land owned by the petitioner. He succeeded before the Record Officer. The petitioner questioned such recording by the Record Officer under the provisions of the Act, but was not successful. The petitioner, therefore, filed an appeal as provided under the Act to the Special

*W.P. No. 1886 of 1973. 29*th November*, 1973.

Deputy Collector, Madurai, who agreed with her that the respondent was not a cultivating tenant as no interest in the land was at any time intended to be transferred under the arrangement referred to above. On revision as against this order to the second respondent, he differed from the Special Deputy Collector and took the view that an interest in the land was transferred under the arrangement of 1966 and that the first respondent was entitled to be recorded as a tenant within the meaning of the Tamil Nadu Cultivating Tenants' Protection Act, 1955. It is as against this order that the present Writ Petition has been filed.

2. In the order challenged, the second respondent while stating the features of the arrangement between the petitioner and the first respondent came to the conclusion that the possession *of the land* was handed over to the first respondent for cultivating the land. He conceded that the petitioner had the concurrent right to plant coffee seeds and to grow other fruit-bearing trees in the land along with the operations which the first respondent could do on the land, which he characterised as agricultural operations. But this feature by itself, according to the second respondent, would not militate against his conclusion that what was agreed to be transferred under the arrangement was an interest in the land and not a licence to the first respondent to use the land for purposes of raising banana plants and enjoy the usufructs therefrom. The petitioner raised incidentally a plea that the 1st respondent has surrendered his right under the arrangement some time prior to the application made by him for recording his rights under the Act. This was, however, disbelieved and as a question of fact, it was found that the first respondent was enjoying the rights which he had under the arrangement on the date when he sought for himself being recorded as a cultivating tenant in the public records. This finding cannot be challenged in this Court.

3. The only question that arises for consideration is as to what is the nature of the interest created under the document dated 17th of November, 1966. At every material stage, the perceivable intent which brought the parties together is easily seen. The sole purpose and intention of the arrangement was to allow the first respondent into the land for purpose of enjoying the bananas out of the plants which the first respondent might raise by using the petitioner's land. The document also enables the petitioner to contemporaneously use such land for her own purposes, and particularly, for agricultural operations in the matter of raising fruit-bearing trees and coffee crops. One singular feature in this arrangement is that the first respondent himself undertook to supervise the coffee crop which the petitioner might raise in the land. The schedule to the document also make clear that what was intended to be granted was "*வாழைக்காய் மாகுல்கள்*". In the light of these textual stipulations between the parties as reflected in the arrangement, the contention of the learned Counsel for the first respondent is that what was intended to be granted under the arrangement of 1966 was an interest in immoveable property. For a person to secure an interest in immoveable property and project rights as a cultivating tenant within the meaning of section 2 (*aa*) of the Madras Cultivating Tenants' Protection Act, he should be a person who contributes his own physical labour or that of any member of his family in the cultivation of *any land* belonging to another, under a tenancy agreement, express or implied. Even if a person satisfies the earlier portion of the definition of 'cultivating tenant'. namely, that he contributes his sinews for purposes of cultivation, yet the accent is upon the land which he has to cultivate under an agreement between himself and another. Any land mentioned in section 2 (*aa*) with reference to particular and individual cases has to be understood as *the land* in those instant cases. Therefore, it is necessary that a person projecting an interest as a cultivating tenant has to prove and establish that he has an interest *in the land* which is the subject-matter of the enquiry.

4. In the instant case, the first respondent was unable to satisfy the appellate authority, namely, the Special Deputy Collector that a particular piece of land out of 11 and odd acres belonging to the petitioner could be carved out from the totality of the land and be said to be

'the land' which has been leased out or demised to him for the purpose of planting banana plants and enjoying the banana usufructs therefrom. Unless there is acceptable proof that a particular piece of land which is decipherable or identifiable and which could be specified is the subject matter of a demise and unless the person who claims a right as a cultivating tenant establishes that his physical labour involving agricultural operations is with reference to such specified and identified land, he cannot be said to be a person having an interest in immovable property or 'the land'. This is the essence and foundation for the proof and establishment of a right within the meaning of section 2 (*aa*) of the Act. It, therefore, follows that if a person claiming such a right is unable to point out clearly that a piece of land is in his sole custody for purposes of being operated upon and for himself utilising the same for his agricultural operations, it cannot be said that there is a relationship of lessor and lessee as is ordinarily understood under the provisions of the Transfer of Property Act as between that person and the owner of that land. Whatever may be the nature of the right as between such two persons, it falls short of a right as a lessee with reference to immovable property. Only if an interest in immovable property is transferred by an instrument, express or otherwise, and that right was so granted by the owner of the land to enable the other person to use it for agricultural purposes, he cannot claim right as a cultivating tenant as well.

5. The question is whether in the instant case such an identified and identifiable interest in the land carved out of a larger extent of land has been given to the first respondent and whether he could in the circumstances, be said to be in exclusive possession of the same to the exclusion of the petitioner, which possession would enable him to raise banana plants therein and enjoy the banana usufructs therefrom.

6. The Special Deputy Collector who heard the first appeal rightly referred to the fact that as the parties agreed to have mixed crops in the land, in the sense, that both the petitioner and the first respondent could cultivate on the same land and as this is a case in which inter-cultivation of crops was possible and was agreed, and as there was no possibility to demarcate or define in clear terms the land on which the first respondent could plant banana trees and enjoy the usufructs therefrom, the respondent would not be entitled to a relief of recognition as a tenant under section 2 (*aa*) of Act XXV of 1955. The Special Deputy Collector also found as a fact that the first respondent admitted before the Record Officer that there were coffee and banana crops in the suit lands when the first respondent took the lease. This admission is a clear pointer to the fact that the parties intended that the totality of the land was to be subjected to multi-cultivation, or, at any rate, to inter-cultivation, as pointed out by the Special Deputy Collector. The petitioner could raise fruit bearing trees and coffee plantations. The first respondent could equally raise within the available space in the land, banana plants and enjoy the usufructs therefrom. All these factors put together do not create a defined interest over a demarcated piece of land in the total extent of 11 acres and odd owned by the petitioner. In these circumstances, I am of the view that no interest in the land has been carved out and transferred by the instrument dated 17th November, 1966.

7. The learned Counsel for the first respondent invited my attention to two decisions of single Judges of our Court, namely *Muthuraju* v. *Rajarathinam*[1] and *Arumutha Vettian* v. *Angamuthu Nattar*[2]. In the first case, Anantanarayanan, J., as he then was, held the view that a person who takes land on lease for enjoyment of the usufruct of the cashewnut plantation therein is a cultivating tenant within the meaning of the old definition. In the second case, Srinivasan, J., went a step further and held that if a person is entitled to usufruct from the trees spread over a period of time during which period the usufruct grew out of the soil, then the right to collect the usufruct is in the nature of immovable property and would accordingly amount to a lease. Before Srini-

1. I.L.R. (1960) Mad. 826: (1960) 2 M.L.J. 475.
2. (1965) 1 M.L.J. 170.

vasan, J., the Division Bench decision of our Court reported in *Govindaswami* v. *Mahalakshmi Ammal*[1], was also cited. But the learned Judge was of the view that the question that arose before him was not directly dealt with therein.

8. But the case more apposite for our purpose is the Bench decision reported in *Govindaswami* v. *Mahalakshmi Ammal*[1] Ramachandra Iyer, C.J., delivering the judgment of the Bench held, under similar circumstances, that the right created under the deed was only in respect of the trees. In the course of the judgment, the learned Chief Justice observed that the provision in the agreement that the person would be entitled to repair the land so as to render it useful for obtaining the produce would seem to imply that no interest in land was created, for if such a right or interest was intended to be created under the document, there was no necessity for this clause at all. With respect, I adopt all these observations and apply the same to the facts of our case. In the agreement between the parties, both have agreed to jointly cultivate the land. It is, therefore, possible to conceive of situations where the physical agricultural operations are carried on in the land not only by the petitioner to the exclusion of the first respondent and reciprocally by the first respondent to the exclusion of the petitioner, but simultaneously by both. If, therefore, both the landlord and the tenant could enter upon the land, and concurrently and jointly carry on agricultural operations for the benefit of themselves, it cannot be said, even in those circumstances, that an interest in a specified land was transferred by the landlord to the tenant. It would be impossible to find out or carve out from the total land as to what portion has been definitely leased out, as contended by the first respondent. This position, though noticed by Srinivasan, J., was not followed since the learned Judge was of the view that the question which arose before him was different. In any event, the Division Bench judgment binds me and the observations therein coupled with the facts which are not disputed and dealt with by me compel me to hold that the order of the second respondent presents an apparent error which has to be set aside by the issue of a rule under Article 226 of the Constitution.

9. If the first respondent has not surrendered possession as contended by the petitioner, and if he is in possession, then it necessarily follows that the petitioner has to avail herself of the provisions of law to evict the first respondent from the land.

10. This petition is, therefore, allowed. No costs.

P. S. P. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*M.M. Ismail, J.*

Periaswami .. *Petitioner**

v.

Rangaswami and others .. *Respondents.*

Tamil Nadu Panchayats (Conduct of Election of President of Village Panchayats) Rules (1970), rule 19 (2)—Election of President—Marking of ballot paper—One seal on scissors and another faint one partly in the cage of squirrel and partly on the border—Whether valid vote—Intention of the voter.

Scissors was the symbol of the petitioner, while the squirrel was the symbol of the 1st respondent. In one vote, there was one seal on the scissors and another a faint one, partly in the cage of squirrel and partly on the border. The Election Tribunal rejected this ballot paper. This was challenged by the petitioner.

Held: Apart from the fact that the Election Tribunal had not recorded any finding with reference to the second proviso to rule 19 (2) of the Tamil Nadu Panchyats (Conduct of Election of President of Village Panchayat) Rules, 1970 that from the way the paper was marked it was not possible to hold that the intention was to vote for a particular candidate, the very statement with regard to the nature

1. (1963) 2 M.L.J. 137.

*W.P. No. 1990 of 1973. 8th *November*, 1973.

of the marking extracted from the order of the Election Tribunal, with reference to the ballot paper in question clearly showed that the intention of the voter was to vote for the symbol "Scissors". Therefore, looked at from any point of view, the rejection of the ballot paper cast in favour of the petitioner herein by the Election Tribunal could not be justified.

[*Paras.* 4 *and* 5].

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the third respondent herein dated 1st February, 1973 and made in O.P. No. 46 of 1972 on his file and quash the said order and made therein.

M.K. Nambiar for *M/s. S. Balathandapani* and *M.N. Krishnamani*, for Petitioner.

R. Balasubramaniyan, for Respondents.

The Court made the following

ORDER:—The petitioner was elected as the President of the Pudupalayam Village Panchayat in the elections held on 28th July, 1970, respondents 1 and 2 herein having been defeated. The first respondent herein preferred an election petition namely, O.P. No. 36 of 1970 on the file of the Court of the District Munsif of Ariyalur to set aside the election of the petitioner. The Election Tribunal by an order dated 16th June, 1972, set aside the election of the petitioner and declared the first respondent herein as the duly elected President. Against the said order, the petitioner filed a writ petition namely W.P. No. 1588 of 1972 (*Periaswamy* v. *Rangaswamy and 2 others*) on the file of this Court praying for the issue of a writ of *certiorari* to quash the same. The said writ petition was allowed on 1st August, 1972 and the Original Petition No. 36 of 1970 itself was remanded for fresh disposal. The said O.P. was numbered as O.P. No. 46 of 1972 before the Principal District Munsif, Tiruchirapalli, and the said Election Tribunal by its order dated 1st February, 1973, after recounting the votes came to the conclusion that the petitioner and the first respondent had obtained an equal number of votes and that therefore a fresh election should be held. It is to quash this order that the present writ petition has been filed under Article 226 of the Constitution of India.

2. Mr. M.K. Nambiar, learned Counsel for the petitioner, contends that the rejection of some of the votes cast in favour of the petitioner by the Election Tribunal is clearly erroneous on the face of it and even if the Election Tribunal is found to have erroneously rejected one ballot paper cast in favour of the petitioner, that will put an end to the equality found by the Election Tribunal and make the votes obtained by the petitioner herein higher in number than those obtained by the first respondent and consequently the election petition filed by the first respondent herein would have to be dismissed. In support of this contention, the learned Counsel places strong reliance on one ballot paper dealt with by the Election Tribunal. That is the ballot paper bearing No. 926866. With regard to this ballot paper, what the Election Tribunal says is this:

> "In vote No. 926866, there is one seal on the Scissors and another a faint one, partly in the cage of Squirrel and partly on the border. It is clear that these votes have to be rejected."

It must be pointed out at this stage that the Scissors was the symbol of the petitioner, while the Squirrel was the symbol of the first respondent. Consequently, if the conclusion of the Election Tribunal is erroneous with regard to vote No. No. 926866 it will follow that that vote will be a valid vote cast in favour of the petitioner herein and therefore the petitioner's total number of votes will be higher than the votes obtained by the first respondent even after recount and hence the petitioner would have been validly elected as the President of the Panchayat. Counting of votes is provided for in rule 19 of the Tamil Nadu Panchayats (Conduct of Election of President of Village Panchayat) Rules, 1970. Sub-rule (2) of rule 19 states as to when a ballot paper shall be rejected. According to that rule,

> "A ballot paper shall be rejected—
>
> (*a*) if it bears any mark or writing by which the elector can be identified, or

(*b*) if no vote is recorded thereon, or

(*c*) if votes are given on it in favour of more than one candidate, or

(*d*) if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given, or

(*e*) if it is a spurious ballot paper, or

(*f*) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established ; or

(*g*) if it bears a serial number, or is of a design, different from the serial numbers, or, as the case may be, design of the ballot papers authorised for use at the particular polling station, or

(*h*) if it does not bear the distinguishing mark which it should have borne under the provisions of sub-rule (2) of rule 13, or

(i) if it does not bear the signature of the Presiding Officer on the reverse side:

Provided that where the Chief Presiding Officer is satisfied that any such defect as is mentioned in clause (*g*), clause (*h*) or clause (*i*) has been caused by any mistake or omission the ballot paper shall not be rejected merely on the ground of such defect:

Provided further that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked."

The case of the learned Counsel for the petitioner is that the second proviso extracted above clearly shows that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked. His further case is that the statement of the Election Tribunal with regard to vote No. 926866 extracted already shows that the said vote cannot be rejected and that as a matter of fact even the Election Tribunal has not recorded any finding with regard to that vote that the same has to be rejected because the intention that the vote shall be for a particular candidate did not clearly appear from the way the paper is marked. A perusal of the order of the Election Tribunal shows that with regard to each one of the so-called doubtful votes, the Election Tribunal has referred to the manner of marking on the ballot paper and has recorded as finding with reference to the proviso extracted above, namely whether the intention clearly appeared from the way the paper was marked or not. On that basis, certain doubtful ballot papers have been counted in favour of the first respondent himself. As far as the ballot paper bearing No. 926866 is concerned, there is no finding by the Election Tribunal that from the way the paper is marked, it is not possible to gather the intention that the vote was for a particular candidate and therefore it has to be rejected. Simply after referring to the fact that one seal is on the Scissors and another, a faint seal, is partly in the cage of Squirrel and partly on the border, the Election Tribunal has chosen to reject the ballot paper. In my opinion, this action of the Election Tribunal is not in accordance with the rules.

3. Mr. Nambiar in this context drew my attention to the relevant provisions of the English law as extracted at pages 198-199 of the Powers, Duties and Liabilities of an Election Agent and of a Returning Officer by Frank R. Parker, Sixth Edition and also the illustration found at page 213 of that edition. The said illustration is as follows:—

1.	LAWSON * HARRY LAWSON WEBSTER LAWSON, *Oakney Cottage, Taplow, in the County of Bucks, Esquire* *
2.	MASTER THOMAS WILLIAM CHESTER MASTER, Junior *The Abbey, Cirencester, Esquire*

Thus, it will be seen that in the above illustration, there is one clear mark against

the name of Lawson and there is another mark on the border projecting into the column left for the other candidate Master. With reference to such an illustration it was held:

> "If a good cross is added to that whose intersection is exactly on the line between the compartments of the paper, the former corrects the uncertainty of the latter (Cirencester, Jan. 1893).."

In my opinion, this illustration directly applies to the facts of this case.

4. Apart from the fact that the Election Tribunal has not recorded any finding with reference to the second proviso to rule 19 (2) extracted already that from the way the paper is marked it is not possible to hold that the intention was to vote for a particular candidate, the very statement with regard to the nature of the marking extracted already from the order of the Election Tribunal with reference to the ballot paper in question clearly shows that the intention of the voter was to vote for the symbol "Scissors".

5. Therefore, looked at from any point of view, the rejection of the ballot paper bearing No. 926866 cast in favour of the petitioner herein by the Election Tribunal cannot be justified. If so, by virtue of this conclusion, the petitioner would have got more votes than the first respondent herein even after recount and consequently the election petition should have been dismissed.

6. The result is, the writ petition is allowed and the order of the Election Tribunal dated 1st February, 1973 in O.P. No. 46 of 1972 is quashed and the said O.P. will stand dismissed. There will be no order as to costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*K. S. Venkataraman and K. N. Mudaliyar, JJ.*

K. M. Ramalinga Nadar and another .. *Petitioners**

v.

The Collector and Additional District Magistrate (J), Kanyakumari District. .. *Respondent.*

Maintenance of Internal Security Act (XXVI of 1971), section 3 (2) (b) read with section 3 (1) (a) (iii)—Past proximate conduct of smuggling rice from one district to another—If and when can be the basis for detention under.

The Supreme Court in *Nagen Murmu* v. *State of West Bengal*, (1973) Crl.L.J. 667: A.I.R. 1973 S.C. 844, has held that past proximate conduct of a person is a relevant factor for ordering detention if it has a rational connection with the necessity of detention. [*Para.* 12.]

In the instant case the instances averred against two detenus were as old as 8th July, 1971, 1st September, 1971, 11th September, 1971 and 29th November, 1971. There was no averment that the lorries belonging to the two detenus were employed by *A* (alleged absconding associate of the detenus) during 1972 and 1973 upto the date of detention *viz.*, 4th October, 1973. Nor was there anything to show that in regard to the six instances in which *A* was implicated stretching over from 4th November, 1971 to 30th January, 1973, any one of the two detenus was involved in any sense whatever. The efflux of time and the consequential interrugnum from 29th November, 1971 to 4th October, 1973 so far as one of the detenus was concerned and from 11th September, 1971 to 4th October, 1973 so far as the other detenu was concerned could not be treated as furnishing a close proximity to, or connection with, the smuggling activities of *A*. The instances which the two detenus were

*W.P. Nos. 5711 and 5712 of 1973. 22nd *November*, 1973.

involved are far too remote for the purpose of raising any rational and reasonable inference of any apprehension of repetition of such act as to justify their detention. [*Para.* 14.]

Case referred to :—

Nagen Murmu v. *The State of West Bengal*, (1973) Crl. L.J. 667: A.I.R. 1973 S.C. 844.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed in each of the Petitions the High Court will be pleased to issue a writ of *habeas corpus* in each for the production before the High Court, Madras the persons C.H. Dhas and C. Wilson respectively, the detenus in Central Jail at Palayamkottai to be dealt with according to law and direct that they be set at liberty.

V.P. Raman, N.R. Chandran and *Jyothi Balasundaram*, for Petitioners.

The Public Prosecutor, for Respondent.

The Judgment of the Court was delivered by

K.N. Mudaliyar, J.:—These two writ petitions refer to the detention of C.H. Dhas and C. Wilson who are detained in the Central Jail, Palayamkottai respectively. Ramalinga Nadar and Jesudhas are the two petitioners praying for a direction from this Court that the two detenus may be released from detention.

2. The Collector and Additional District Magistrate (I) of Kanyakumari District passed a composite order of detention of three persons Arthur Hendrose *alias* Manthri, C.H. Dhas *alias* K.C. Dhas *alias* Rajan and C. Wilson under section 3 (2) (*b*) read with section 3 (1) (*a*) (iii) of the Maintenance of Internal Security Act, 1971 (Central Act XXVI of 1971). C.H. Dhas and C. Wilson were arrested and detained, but Arthur Hendrose is absconding and he is not yet apprehended.

3. It emerges from the record that Arthur Hendrose and C.H. Dhas are the sons of one Haridoss. C. Wilson is the brother of the said Haridoss.

4. Arthur Hendrose is the owner of lorry KLV : 7153 styled as 'Adam', T.M.C. 9047 styled as 'Peace' which was later on re-registered under registration No. KLV: 7470 'Brothers' and the lorry bearing No. MDF: 3148 styled as 'Thilaga Transport'. The name of the lorry KLV 7470 was later altered as 'Adham' which was subsequently changed, as 'Vijayalakshmi'.

5. C.H. Dhas, the elder brother of Arthur Hendrose is the owner of the lorry MDK: 3144 styled as 'Vijayalakshmi, and KLT 8577 styled as 'Peace'

6. C.Wilson is the younger brother of Haridoss. He is the owner of the lorry KLV 5018 styled as 'C. Wilson' which was later on changed as 'Geethamalar'. (Haridoss is the father of Arthur Hendrose and C.H. Dhas. He is the owner of the lorry KLV 3234. Haridoss is not the subject-matter of any detention order)

7. It emerges from the impugned detention order that C.H. Dhas is implicated in the incident that occurred on 4th November, 1971, 1st September, 1971 and 29th November, 1971. These incidents are the subject-matter of crimes registered in Crime No. 895 of 1971 of Thakkalai police station under clause 3 of the Southern States (Regulation of Export of Rice) Order which was then pending trial and in Crime No. 916 of 1971 of Kuzhithurai police station under clause 3 of the Southern States (Regulation of Export of Rice) Order and section 426, Indian Penal Code and section 77 read with 112 of the Motor Vehicles Act and in Crime No. 951 of 1971 of Thakkalai police station under clauses 2 and 3 of the Southern States (Regulation of Export of Rice) Order which is under investigation respectively.

8. C. Wilson also is directly concerned in two incidents that occurred on 8th July, 1971 and 11th September, 1971 in Crime No. 325 of 1971 of Arumani police station under clause 3 of the Southern States (Regulations of Export of Rice) Order, 1964 read with sections 3 and 7 of the Essential Commodities Act and section 307, Indian Penal Code which is now pending trial before the Additional I Class Magistrate, Kuzhithurai in crime No. 922 of 1971 of Kuzhithurai police station under clause 3 of the Southern States (Regulations of Export of Rice)

Order, 1964 read with section 3 and 7 of the Essential Commodities Act which ended in acquittal for want of legal evidence, respectively.

9. The further averment in the order of detention against C.H. Dhas (detenu) is that he was found travelling and smuggling 100 bags of rice from Tamil Nadu to Kerala State in a lorry MDK: 3148 styled as 'Thilaga Transport' belonging to Arthur Hendrose on 4th November, 1971. He was chassed and arrested and a case was then pending on the date of the detention order. Two other instances of the same kind in which C.H. Dhas was involved were said to have occurred on 1st September, 1971 and 29th November, 1971. These two instances have been elaborately described in the body of the detention order.

The allegation against C. Wilson is that on 8th July, 1971 his lorry KLV: 5018 dashed against the check-post and entered into Kerala State. In this case, C. Wilson applied for the return of the lorry from the Court of the Additional I Class Magistrate, Kuzhithurai and took delivery of it on furnishing security. On 11th September, 1971 the same lorry belonging to C. Wilson bearing registration No. KLV : 5018 was sighted by the revenue staff entering into Kerala State. At the sight of the Police party the driver of the lorry stopped the vehicle and escaped from the spot. But the lorry was found to contain 10 bags of rice. C. Wilson was not directly involved in the crime, but his lorry contained 10 bags of rice which was attempted to be smuggled into Kerala State from Tamil Nadu State.

10. The gravamen of the complaint against the two detenus, C.H. Dhas and C. Wilson (and Arthur Hendrose) is that all the three persons have been smuggling rice from Tamil Nadu to Kerala State with the help of their close associates and lorry drivers and agents and therefore they have been indulging in acts prejudicial to the maintenance of supplies and services essential to the community.

11. The respondent averred in his counter-affidavit that the two detenus, Arthur Hendrose and Haridoss are leading a joint family system of life with mutual understanding to help one another in their activities of smuggling rice, foodgrains and other essential commodities from Tamil Nadu to Kerala State. They are all residing very close to the Tamil Nadu border. With the active connivance of a net work of unauthorised dealers and agents of Kanyakumari District like Thiru Kolappan Chettiar of Kottar these persons are dealing in smuggling of rice from Kanyakumari District in Tamil Nadu to Kerala State. According to the respondent, the said persons are dealing in black-marketing and smuggling jointly by owning different lorries in their individual names. The petitioners refuted the averment of the respondent that they are living as a joint family. But the respondent reiterated the averment that they are living as a joint family; they are all living together in one and the same premises and they are all carrying on illicit transactions jointly. The respondent further stated that though the instances relating to the detenus C.K. Dhas and C. Wilson related to the year 1971, there are telling circumstances connecting them with the illicit transport of rice from Tamil Nadu to Kerala State as stated in the grounds of detention.

12. The main argument advanced by the learned Counsel on behalf of the detenu that the two detenus have not employed their lorries in the smuggling activities from the end of 1971 and there is no reasonable nexus between the activities of the two detenus and the detention order and that the order of detention itself treats Arthur Hendrose as the villain of the piece and that the averment that the two detenus and Arthur Hendrose are leading a joint family system of life is without any basis. The learned Counsel further reinforced his argument by relying on the rationale found in the judgment of the Supreme Court in *Nagen Murmu* v. *The State of West Bengal*[1], The Supreme Court of India held that past proximate conduct of a person is a relevant factor for ordering detention if it has a rational connection with the necessity of detention and that the detention for a two-year-old solitary incident must fail.

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1. (1973) Crl.L.J. 667: A.I.R. 1973 S.C. 844.

13. In the Supreme Court case, we notice that the detenu raided the house of one Jiban Krishna Das, shot the house-owner to death, looted cash and ornaments worth about Rs. 2,300 and set fire to his house. These offences are bound to be sporadic in their nature and not recurrent often. There is no likelihood of repetitive proclivities in a detenu to commit such offences. The activities of smuggling and such various instances constitute a continuous thread spanning over a number of years like, for example, the instances cited against Arthur Hendrose in the detention order in question. Nevertheless, we can act on the reason behind the Supreme Court judgment by applying the same to the facts relating to the two detenus.

14. Undoubtedly, the instances averred against the two detenus are as old as 8th July, 1971, 1st September, 1971, 11th September, 1971 and 29th November, 1971. We do not find any averment that the lorries belonging to the two detenus were either employed by Arthur Hendrose during 1972 and 1973 upto the date of detention *viz*, 4th October, 1973. Nor do we find that in regard to the six instances in which Arthur Hendrose is implicated stretching over from 4th November, 1971 to 30th January, 1973, any one of the two detenus is involved in any sense whatever. The efflux of time and the consequential interrognum from 29th November, 1971 to 4th October, 1973 (so far as C.H. Dhas is concerned) and from 11th September, 1971 to 4th October, 1973 (so far as C. Wilson is concerned) cannot be treated as furnishing a close proximity to, or connection with, the smuggling activities of Arthur Hendrose. The instances in which the two detenus are involved are far too remote for the purpose of raising any rational and reasonable inference of any apprehension of a repetition of such an act so as to justify their detention.

15. We direct that the two detenus, C.H. Dhas and C. Wilson, be set at liberty.

V.K. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*M.M. Ismail, J.*

Shri Yaralagadda Venkanna Chaudary .. *Petitioner**

v.

The Union of India represented by the Under Secretary to Government Ministry of Defence, New Delhi. .. *Respondent.*

Interpretation of Document—Lease—Land in cantonment area—Lease deed executed in 1901—*Form* B *of Cantonment Code,* 1899—*Condition XXVII—Reference to Local Government—State Government or Central Government—Government of India Act* (1935), *section* 313.

Under a lease deed executed on 3rd August, 1901, in relation to land in a cantonment area the Central Government resumed the leasehold interest acting under Condition XXVII of the lease. The assignee of the lessee contended that the local Government referred to in Condition XXVII will not include the Central Government and it would mean only the State Government and the power of resumption not having been exercised by the State Government but only by the Central Government, the said order of resumption was illegal.

Held: It was not disputed that the cantonment with the lands therein, was a matter within the exclusive legislative competence of the Indian Legislature under the Government of India Act, 1935. Consequently a conjoint reading of sub-sections (1) and (2) of section 313 clearly postulated that after the coming into force of Part III of the Government of India Act of 1935 on and with effect from 1st April, 1937 it was the Governor-General in-Council who had the executive authority over the land in question. That was the position till the coming into force of the Constitution of India. The only point for consideration was whether there was anything in the Constitution of India to change that

*W.P. No. 1740 of 1971. 22nd November, 1973.

position and substitute the State Government in the place of the Governor-General-in-Council. The Union Government had taken the place of the Governor-General in Council under the provisions of the Constitution and therefore now it was the Central Government which would exercise the powers of the local Government as contemplated by Condition XXVII of the lease in question. Hence the Central Government was competent to resume the leasehold right as it had done pursuant to its powers under Condition XXVII of the agreement. [*Para.* 4.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondent relating to his order dated 5th May, 1971 and made in No. 701/179/L/L & C/70/2878/D (Lands) and quash the same as illegal and without jurisdiction.

R. G. Rajan, for Petitioner.

K. Alagiriswami, for Respondent.

The Court made the following

ORDER:—Admittedly an extent of 9-72 acres of land belonged to the Secretary of State for India in Council and it was granted on lease in Form B of the Cantonment Code, 1899, under a lease deed dated 3rd August, 1901 in favour of one Malik Mohideen Hossain Khan Sahib son of Malik Mahomed Tecky Ali Khan Sahib, The petitioner herein claims to be an assignee of the interest of the lessee in respect of the land in question. The Government of India, in the Ministry of Defence, by an order dated 5th May, 1971 resumed the leasehold interest in respect of an extent of 5-32 acres of land under Condition XXVII of the lease and offered a sum of Rs. 507 as the value of the erections standing on the land. The Writ Petition has been filed praying for the issue of a writ of *certiorari* to quash this order of the Government of India.

2. The principal question that is urged before me by the learned Counsel for the petitioner is that under the lease dated 3rd August, 1901 resumption can be effected only by the local Government and not by the Government of India. Condition XXVII is that

> "the local Government may resume the land or any portion thereof at any time after giving one month's notice in writing and on payment of compensation for such buildings standing on the land or portion thereof as shall have been erected under proper authority. If there shall be any dispute as to the amount of such compensation the same shall be referred to a committee of arbitration which shall be constituted as provided in Chapter XX of the Cantonment Code, 1899, and the lessee, his heirs, executors, administrators, representatives and assigns shall be bound by the decision of the committee of arbitration."

Mr. R.G. Rajan, learned Counsel for the petitioner contends that the local Government referred to in Condition XXVII will not include the Central Government and it will mean only the State Government and the power of resumption not having been exercised by the State Government but only by the Central Government, the said order of resumption is illegal.

3. In my opinion, the above said argument is misconceived. As I pointed out already, the lease is dated 3rd August, 1901 and the lease admittedly was entered into by the Secretary of State for India in Council being the owner of the land. At the time when the lease was entered into the form of Government in this country was unitary in character and all the powers were exercised in relation to the administration of India only by the Secretary of State for India in Council and the concept of local Government with reference to the Government of Provinces was only in terms of the devolution rules and not on the basis of any Constitutional arrangement. Therefore, what exactly the connotation of local Government occurring in Condition XXVII is has to be gathered with reference to the subsequent changes that took place in the Constitutional set up in the governance of the country. By section 2 (1) of the Government of India Act, 1935

> "all rights, authority and jurisdiction heretofore belonging to His Majesty

the King-Emperor of India, which appertain or are incidental to the Government of the territories in India for the time being vested in him, and all rights, authority and jurisdiction exercisable by him in or in relation to any other territories in India, are exercisable by His Majesty, except in so far as may be otherwise provided by or under this Act, or as may be otherwise directed by his Majesty."

Sub-section (2) of this section stated:

"The said rights, authority and jurisdiction shall include any rights, authority or jurisdiction heretofore exercisable in or in relation to any territories in India by the Secretary of State, the Secretary of State in Council, the Governor-General, the Governor-General in Council, any Governor or any Local Government, whether by delegation from His Majesty or otherwise".

Thus the effect of sub-section (1) of section 2 read with sub-section (2) thereof, of the Government of India Act, 1935 was to transfer all the powers of the Local Government also to His Majesty except in so far as the same was directed to be exercised under the provisions of the Government of India Act, 1935. Admittedly, the land in question is situate in the cantonment area of St. Thomas Mount which belonged to the Secretary of State for India in Council at the time when the lease was entered into and belonged to the Government of the Federation as contemplated by the Government of India Act, 1935. Section 177 of the Government of India Act, 1935 provided for the performance of the existing contracts. In sub-section (1) of that section it is stated:

"Without prejudice to the special provisions of the next succeeding section relating to loans, guarantees and other financial obligations, any contract made before the commencement of Part III of this Act by, or on behalf of, the Secretary of State in Council shall, as from that date—

(*a*) if it was made for purposes which will after the commencement of Part III of this Act be purpose of the Government of a Province, have effect as if it had been made on behalf of that Province and

(*b*) in any other case have effect as if it had been made on behalf of the Federation."

Having regard to the admitted fact that the lands in question are in cantonment area it is indisputable that the lands were used for the purpose of the Federation of India and consequently under the terms of section 177 (1) (*b*) of the Government of India Act, 1935 the Central Government must be deemed to be the party to the contract as far as the present lease is concerned.

4. Part III of the Government of India Act, 1935 dealing wih the Governors' Provinces came into force with effect from 1st April, 1937 under Government of India (Commencement and Transitory Provisions) Order, 1936 and section 312 provided that the provisions in that part shall apply in respect to the period elapsing between the commencement of Part III of this Act and the establishment of the Federation. Under section 313 (1) of the Act

"Subject to the provisions of this Act for the time being in force, such executive authority as is hereinafter mentioned shall be exercised on behalf of His Majesty by the Governor-General in Council, either directly or through officers subordinate to him, but nothing in this section shall prevent the Indian Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor-General in Council any functions conferred by any existing Indian law on any Court, Judge or officer, or on any local or other authority."

Sub-section (2) of this section stated:

"Subject to the provisions of this Act for the time being in force, the said executive authority extends—

(*a*) to the matters with respect to which the Indian Legislature has under the said provisions power to make laws;

(*b*) to the raising in British India on behalf of His Majesty of naval, military or air forces, and to the governance

of His Majesty's forces borne on the Indian establishment;

(c) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance or otherwise in and in relation to the tribal areas;"

It is not disputed that the cantonment with the lands therein, is a matter within the exclusive legislative competence of the Indian Legislature under the Government of India Act, 1935. Consequently a conjoint reading of sub-sections (1) and (2) of section 313 clearly postulates that after the coming into force of Part III of the Government of India Act, 1935 on and with effect from 1st April, 1937 it was the Governor-General in Council who had the executive authority over the land in question. That was the position till the coming into force of the Constitution of India. The only point for consideration is whether there is anything in the Constitution of India to change that position and substitute the State Government in the place of Governor-General in Council. The Union Government has taken the place of the Governor-General in Council under the provisions of the Constitution and therefore now, it is the Central Government which can exercise the powers of the local Government as contemplated by Condition XXVII of the lease in question. Hence the Central Government was competent to resume the leasehold right as it has done pursuant to its powers under Condition XXVII of the agreement.

5. Mr. R.G. Rajan then contended that identical extent of land has been requisitioned by the Collector on 17th October, 1964 in exercise of his powers under section 29 (1) of the Defence of India Act, 1962 for the use of the Defence Department and consequently without derequisitioning it, the Government of India, cannot exercise its power of resumption under Condition XXVII of the lease. I am of the opinion that there is absolutely no substance in this contention. The resumption of the interest conveyed to the petitioner herein by way of assignment in his favour by the original lessee, is not dependent upon the derequisitioning and the two are separate and independent acts and the fact that the lands continued to be requisitioned under that Act will not affect the power or the authority of Central Government to resume the land under Condition XXVII of the lease in question.

6. Under these circumstances, no case has been made out for interference with the impugned order and, therefore, the writ petition fails and is dismissed. No costs.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K.S. Venkataraman, J.*

K. Ramachandran (Occupier) M/s. Ravendra Mills Limited, Coimbatore and another .. *Appellants**

v.

Employees State Insurance Corporation through the Insurance Inspector, Coimbatore .. *Respondent.*

and

The Management of Selvaraja Mills Private Limited, Coimbatore .. *Appellant*

v.

The Employees State Insurance Corporation represented by the Assistant Regional Director, Madras-4 .. *Respondent*

Employees State Insurance Act (XXXIV of 1948), section 2 (a)—Employee—Mill manufacturing yarn—Construction of buildings for expansion of existing factory—Workers engaged in construction—Whether within the definition of 'employee'.

A worker engaged in the construction of a factory cannot be said to be employed on any work of the factory or any work incidental to such work. It could not even be said that he was directly employed on any work connected with the work of the factory, because that would suggest that the factory had commenced work and the work was connected with the work of the factory. [*Para.* 18.]

The work of the additional construction to house additional spindles would not

*A.A. O. Nos. 260 to 262 of 1968. 13*th August*, 1973.

certainly be work of the existing factory and would not be work incidental to the work of the existing factory.

Therefore, any worker engaged in the construction of buildings put up purely to house additional spindles would not be an 'employee' within the meaning of section 2 (9) of the Employees State Insurance Act. [*Paras.* 18 *and* 21.]

Cases referred to :—

E.S.I. Corporation v. *C.H. Raman*, (1957) 1 L.L.J. 267; *E.S.I. Corporation* v. *Ganapatia Pillai*, (1961) 1 M.L.J. 143; *Nagpur Electric Light and Power Co., Ltd.* v. *E.S.I. Corporation*, (1967) 3 S.C.R. 92: (1968) 1 S.C.J. 374 : A.I.R. 1967 S.C. 1364; *Mahalakshmi Oil Mills* v. *E.S.I. Corporation*, (1970) 2 M.L.J. 549; *E.S.I. Corporation* v. *Prabhulal Brothers*, 86 L.W. 101; *Thiagarajan Chettiar* v. *E.S.I. Corporation, Madurai*, (1963) 2 M.L.J. 77: A.I.R. 1963 Mad. 361; *Gnanambikai Mills* v. *E.S.I. Corporation*, (1970) 2 L.L.J. 233.

Appeals against the order of the State Employees Insurance (District Court) Coimbatore dated 17th April, 1968 and made in Proceedings Nos. 12 of 1966; 3 of 1967 and 5 of 1967 respectively.

M. R. Narayanaswami, for Appellant.

The Central Government Standing Counsel, for Respondent.

The Court delivered the following

JUDGMENT:—These three appeals have been heard together since they raise a common question of law and hence they are being disposed of by a single judgment. In each case the principal question is whether, when an additional building is constructed to install new spindles in an existing factory manufacturing yarn, the workers employed in the construction of the new factory can be held to be employees within the meaning of the expression in the Employees State Insurance Act, 1948, and the owner of the building is bound to pay contribution for insurance under the Act.

2. A.A.O. No. 260 of 1968 arises out of a petition (No. 12 of 1966) filed under section 75 (2) of the Employees State Insurance Act, 1948, (hereinafter referred to as the Act) by the Employees State Insurance Corporation to recover a sum of a little over thousand rupees towards the employees' contribution from Ravendra Mills Limited, for the period 1st January, 1961 to 30th September, 1963. The Mills were manufacturing yarn engaging more than twenty persons and certainly constituted a 'factory' within the meaning of section 2 (12) of the Act. The Mills wanted to expand their manufacturing capacity and certain buildings were put up in that connection. The buildings also included a rest-house for the workers and a creche for the workers' children. The rest-house and the creche would be useful even for the employees already employed in the existing factory. For putting up these buildings some workers were employed. The Mills contended that these workers would not come within the definition of 'employee' in section 2 (9) of the Act and that therefore, they were not liable to pay any contribution in respect of these workers. The Employees State Insurance Court, *viz.*, the District Judge, Coimbatore, overruling their pleas, allowed the application of the State Insurance Corporation. Hence the appeal by the Mills.

3. A.A.O. No. 261 of 1968 arises out of an application (No. 3 of 1967) before the District Judge, Coimbatore, filed by Selvaraja Mills Private Limited, under section 75 of the Act for a declaration that they were not liable to pay a sum of Rs. 2,834 demanded by the State Insurance Corporation. About 12,320 spindles had been installed in the Mills. They wanted to expand the spindlage to 25,000 as permitted by the Government of India. For the purpose of housing the additional spindles they put up constructions. They engaged a large number of workers to do the work. They contended that they engaged the workers through an independent contractor and that they were not liable to pay contribution in respect of those workers. The learned District Judge overruled that plea and dismissed their application. Hence this appeal.

4. A.A.O.No. 262 of 1968 arises out of an application (No. 5 of 1967) filed by the Employees State Insurance Corporation

against Sarguna Textiles for recovery of a sum of Rs. 510 for contribution under the Act. The contention of the Mills was that they put up the additional machinery for installing more spindles, that they employed the workmen through independent contractors, that the workers were not employees within the meaning of the definition under the Act and that they were not liable to pay contribution. That plea was overruled and the petition was allowed. Hence the appeal by the Mills.

5. It will be seen that in all these cases the Mills constructed buildings to house additional spindles. The question for consideration is whether the workers employed in the construction of the buildings would be employees within the meaning of section 2 (9) of the Act and whether contribution has to be paid in respect of them to the State Insurance Corporation. The features of the Act are well known but may be briefly recapitulated. As the name itself indicates the Act provides for insurance against sickness and disablement of workers. It is mainly confined to factories, though it may be extended to other establishments. An employee himself has to pay contribution and the employer also has got to pay contribution. The employer may collect the contribution from the employee, but he is responsible for paying the consolidated contribution to the State Insurance Corporation. The Act contemplates that only persons employed for a minimum period are qualified for the benefits of the Act. It is called the benefit period. Contribution has to be paid over a period preceding the benefit period and that period is called the contribution period. Each benefit period is taken as a unit and, if no benefit is claimed in that period that lapses. The next cycle of the contribution period and benefit period begins.

6. Section 2 (9) of the Act, so far as material for us, defines "employee" thus:

> (9) "Employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies, and (*i*) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere.

7. I may at once dispose of the contention of the Mills that the workers were employed through an independent contractor. The available evidence clearly goes to negative that contention and goes to show that the workers were employed directly by the Mills. I therefore confirm the finding in that behalf given by the District Judge in each case. This brings us to the really important question, namely, whether when buildings are put up for expanding the manufacturing capacity of the Mills, any worker employed for that purpose can be said to be a person employed for wages in or in connection with the work of a factory and is directly employed on any work of, or incidental or preliminary to or connected with the work of, the factory within the meaning of the definition which has been quoted. The question has to be decided in the light of the decisions which have interpreted the statutory provision. To start with, there is a decision of the Bombay High Court in *E.S.I. Corporation* v. *C. H. Raman*[1], Gajendragadkar and Chainani, JJ. There the respondent Raman was employed in the administrative office of J.K. Chemicals Limited. J.K. Chemicals Limited were the occupiers of a factory called Eastern Chemical Company. They were situated in the same compound. In the building of the factory itself there was a separate office for the factory, and this office looked after the conduct of the factory. The administrative office handled the sales of the goods manufactured in the factory, as well as goods imported from abroad. The learned Judges held, on the facts of that case, that the work in the administrative office was not connected with the work of the factory and that therefore the respondent Raman was not liable to pay contribution under the Act. They observed :

> "The points raised before us by Mr. Desai in this appeal must be considered on the facts which are admitted and we propose to confine our decision to these special facts. It is not the case of the Corporation that the Eastern Chemical Company, as one company

1. (1957) 1 L.L.J 267.

runs two departments, in one of which chemicals are manufactured and in another department the said articles are sold. Conceivably there may be factories which are started with the object of procducing goods as well as selling them. In the present case, on the facts admitted, the work of the factory, which is carried out in one building, begins with the collection of raw materials and ends with the production of chemical articles. The J.K. Chemicals Limited, looks after the sale of these articles. But it is significant that the J.K. Chemicals Limited, looks after the sales of other imported goods as well and the work of this sale is carried on in the administrative office where the respondent is engaged."

8. It was contended before the learned Judges that, in view of the definition of "factory" in section 2 (12) of the Act, the administrative office also would be part of the factory. The definition of "factory", so far as material, is:

> " 'Factory' means any premises including the precincts thereof wherein twenty or more presons are working, and in any part of which a manufacturing process is being carried on with the aid of power......"

9. The contention of the Corporation was that it was sufficient that the manufacturing process was being carried on in any part of the premises within which the administrative office was situated. The learned Judges dealt with the case on the assumption that the administrative office was a factory within the meaning of section 2 (12) of the Act, but they went on to observe that the crucial question had yet to be decided, namely; "it would be necessary for the Court to hold that the respondent is an employee within the meaning of section 2 (9) of the Act:".

10. The learned Judges further observed :

> "We have no difficulty in accepting the argument that the policy of this Act was to enlarge the curb of employees and make the benefits of this Act available to a class of workers larger than the class included in the Indian Factories Act........ Nevetherless, before the respondent can be said to be an employee within the meaning of section 2 (9) (*i*), it must be shown that he has been employed on any work of, or incidental or preliminary to or connected with the work of the factory. It is necessary to emphasize that on the facts admitted in this case it is not shown that the work of the factory was to sell the products of the factory. *The work of the factory in the present case began with the collection of raw materials and ended with the production of finished articles.* If that be so, it would be difficult to accede to the argument that the work of selling the products of the factory was connected with the work of the factory." (Italics is mine).

11. The above observations were quoted with approval by a Bench of this Court (Rajamannar, C.J., and Veeraswami, J.) in *E. S. I. Corporation* v. *Ganapatia Pillai*[1]. In that case the factory was the Lotus Mills Limited; and Lotus Agency (Private) Limited were their Managing Agents. The question arose about the liability to pay contribution in respect of seven persons employed in the office of the Managing Agents. The final decision was that only one of them could be said to be an employee within the meaning of section 2 (9) of the Act, because he alone was connected with the work of the factory and the other persons were not. After quoting section 2 (9), the learned Judges observe:

> "Now 'the work' which is the prime factor is the work of the factory. Factory means the premises wherein a manufacturing process is being carried on. It follows that only persons who are in some manner or another connected with the said work, *viz.*, manufacturing process, that can be said to be, 'employees' within the meaning of the definition. There are no doubt the words, 'incidental or preliminary to', but both these have to be understood in conjunction with the words 'with the work of the factory'. So the work done by the person in question should be work incidental or preliminary to the work of the factory as such."

1. (1961) 1 M.L.J. 143.

12. Applying the above test, the learned Judges observed:

"Of the seven persons from whom contribution is demanded, in our opinion, only one of them, namely, Sri T.N. Kanthanathan, can be brought under the definition, interpreting its language as widely as we can. Sri Kanthanathan, disburses not only the pay of the officers and staff, but also the wages to the workers of the mill. It may be said that the payment of wages to the workers employed in the factory is in a sense incidental to or connected with the work of the factory..... Of the other persons sought to be made liable, it cannot be said in any sense that they are employed on any work of or incidental or preliminary to or connected with the work, of the factory. They are all persons employed in the Managing Agents' Office."

The learned Judges point out that it was not disputed that the Managing Agents' office was concerned purely with the administrative side of the mills and sale of finished products and was not in any way connected with the manufacturing process or with the work of the factory.

13. *Nagpur Electric Light and Power Company Limited* v. *E. S. I. Corporation*[1], concerned persons employed in the Nagpur Electric Light and Power Company, which was a factory whose work was transforming and transmitting electric power. The company did not produce electricity itself, but received electricity in bulk from Maharashtra, stepped down the voltage in the factory or in the sub-stations and distributed it to customers. The company and the workers contended that they were not liable to pay contribution under the Act. That contention was overruled and it was held that all those who were engaged in that work or in connection with that work would be employees, within the meaning of section 2 (9) (*i*) of the Act, whether they worked in the premises of the factory or outside, including the sub-stations. For our purpose, it is significant to note that the case of *E.S.I. Corporation* v. *C. H. Raman.*[1] was cited before the Supreme Court on behalf of the company and the employees, but was merely distinguished, and the correctness of the decision was not doubted. Their Lordships observe:

"The case of the *Employee s' State Insurance Corporation* v. *Raman*[1], is distinguishable. In that case the company had a factory and an administrative office. The office was situated in a building which was situated within the same compound in which the factory was located. The entire compound was surrounded by one compound wall. It was found that the work of the factory began with the collection of raw materials and ended with the production of finished articles and the work of selling the products was not connected with the work of the factory. The administrative office handled sales of the products manufactured in the factory as well as goods imported from abroad. The factory and the administrative office maintained separate muster and wage rolls and separate accounts. In these circumstances, it was held that the clerks employed in the administrative office, whose work consisted mainly of taking down dictations from the manager and other officers and typing out letters, were not employees within the meaning of section 2 (9). The facts of the present case are entirely different. The company maintains one establishment for its factory. The factory does the work of transferming and transmitting electrical energy. All the workers in question including the clerks and the administrative staff are engaged in connection with this work. None of them is employed in any separate establishment unconnected with the work of the factory."

14. *Mahalakshmi Oil Mills* v. *E.S.I. Corporation*[2], was a case decided by Maharajan, J. That was a case where a private limited company (Dhakeswari Rice and Oil Company, Private, Limited) was the proprietor of Mahalakshmi Oil Mills. The company was engaged not only in running the Mahalakshmi Oil

1. (1967) 3 S.C.R. 92 : (1968) 1 S.C.J. 374: A.I.R 1967 S.C. 1364.

1. (1957) 1 L.L.J. 267.
2. (1970) 2 M.L.J. 549.

Mills, but also in buying and selling all kinds of vegetable oils and exporting the same. Fourteen persons were working in the factory (oil mills). The question was about six other persons who were working in the office of the company. The learned Judge pointed out that in the definition of "factory" in section 2 (12) of the Act it was stated that the expression "manufacturing process" shall have the same meaning assigned to it in the Factories Act. The learned Judge read it with the definition in section 2 (*k*) of the Factories Act and observed:

> "This definition makes it clear that the use, sale, transport, delivery or disposal of a manufactured product does not come within the ambit of the expression 'manufacturing process'. Reading the definition of employee in section 2, clause (9) of the Employees State Insurance Act along with the definition of 'factory' in clause (12) of section 2 of the same Act and in conjunction with the definition of 'manufacturing process' contained in section 2 (*k*) of the Factories Act, there can be little doubt that only persons who are in some way or other connected with the work of the factory, namely, the manufacturing process, that can be said to be employees within the meaning of the definition."

The learned Judge observed that that was precisely decided by the Bench of this Court in *E.S.I. Corporation* v. *Ganapatia Pillai* [1], and that that decision was binding on him. It was contended before Maharajan, J., that the decision of the Supreme Court in *Nagpur Electric Light and Power Company Limited* v. *E.S.I. Corporation* [2], had, by implication, overruled the decisions of the Bombay High Court in *E.S. I. Corporation* v. *C.H Raman* [3], and of this Court in *E.S.I. Corporation* v. *Ganapatia Pillai* [1]. The learned Judge observed:

> "I am unable to agree. In the said decision of the Supreme Court, the question that arose for consideration was whether clerical and other non-manual workers connected with the work of a factory could be regarded as employees within the meaning of section 2 (9) (*i*) or not. In fact, their Lordships referred, in the course of their discussion, to the decision in *E.S.I. Corporation* v. *C. H. Raman* [1], and, without overruling it, merely distinguished it. The two Division Bench rulings relied upon by me have considered a question which directly arises for determination in this case and which was not decided by the Supreme Court."

15. In *E.S.I. Corporation* v. *Prabhulal Brothers* [2], Veeraswami, C.J. and Raghavan, J., disapproved of the reasoning of Maharajan, J. The respondents in that case were engaged in the manufacture and sale of umbrellas. Eighteen workmen had been admittedly engaged in the actual manufacture of umbrellas. In addition, there were one accountant and two sales clerks working in the premises. If they were taken into consideration, liability under the Employees' State Insurance Act, 1948, would arise, but, otherwise, not. The Bench referred to the definition of "employee" in section 2 (9) of the Act, and observed:

> "There is also the definition of a factory. It is in terms of the premises, including the precincts wherein twenty or more persons are employed and in any part of which a manufacturing process is carried on without the aid of power or is ordinarily carried on, but does not include a mine subject to the operation of the Mines Act, 1952 or Southern railway running shed. Reading the two definitions, side by side, it is clear as we think, that they will cover the two sales clerks. A factory is not defined in terms merely of a manufacturing process or in relation to the work of manufacture. A factory is defined as a place where a minimum number of workmen should be engaged and in any part of the precincts, be it noted, a manufacturing process is carried on. When therefore, in sub-section (9) of section 2 the definition of an employee speaks of 'in connection with the work of a factory' or 'employ-

1. (1961) 1 M.L.J. 143.
2. (1967) 3 S.C.R. 92 : (1968) 1 S.C.J. 374 : A.I.R. 1967 S.C. 1364.
3. (1957) 1 L.L.J. 267.

1. (1957) 1 L.L.J. 267.
2. 86 L.W. 101.

ed by the principal employer on any work of or incidental or preliminary to or in connection with the work of the factory', the work of the factory is not to be equated to the manufacturing process. In our opinion, there is no justification to read the two definitions in that manner. The work of the factory may comprise of activities wider than the manufacturing process and we think it should be necsessarily so.

The view of ours is supported by the *Nagpur Electric Light and Power Company Limited* v. *E.S.I. Corporation*[1]. It was there held that where a company maintained an establishment for its factory and the factory did the work of transforming and transmitting electrical energy, all employees, clerical or otherwise, including administrative staff, were employed in connection with the work of the factory, and none of them was employed in any separate establishment unconnected with the work of the factory, and all workers of disputed categories whether they worked in the factory or elsewhere were employees within the meaning of section 2 (9) (*i*) of the Employees' State Insurance Act. In that case, some of the employees were clerks; they were not engaged in manual labour. But a person doing non-manual work could well be regarded, as was done in that case, as an employee within the meaning of that definition, if he was employed in connection with the work of the factory. In this case, the factory, as we mentioned, was engaged in the manufacture of umbrellas. It is inconceivable that the work of the factory did not include sale of such umbrellas. If it were otherwise, it would be unrealistic, having regard to the concept of a factory. A factory is associated with a commercial activity and that activity will have as its ultimate aim the marketing of its products. Sale clerks, therefore, would clearly fall within the definition of the term 'employee' in the Act.

Our attention has been invited to *Mahalakshmi Oil Mills* v. *E.S.I. Corporation*[1]. There a learned single Judge of this Court referred to the *E.S.I. Corporation* v. *Ganapatia Pillai*[2] and thought that the work of the factory was equated to the manufacturing process. That was not the decision in the *E.S.I. Corporation* v. *Ganapatia Pillai*[2]. In any case, in our opinion, that view is not sound."

1. (1967) 3 S.C.R. 92 : (1968) 1 S.C.J. 374: A.I.R 1967 S.C. 1364.

16. Mr. S. Ali Mohamed, the learned Counsel who appears for the Corporation has urged before me that the recent Bench decision in *E.S.I. Corporation* v. *Prabhulal Brothers*[3], must be understood as holding that the prior Bench decision in *E.S.I. Corporation* v. *Ganapatia Pillai*[2], has been overruled by the decision of the Supreme Court in *Nagpur Electric Light and Power Company Limited* v. *E.S I. Corporation*[4], The basis of this submission is this. It was held by the Bench of this Court in the earlier decision that the managing agents of the company dealt with the sale of the products manufactured in the factory of which they were the managing agents and that they were not in any way connected with the manufacturing process or with the work of factory. The work in the factory did not therefore extend to the sale of the finished product. The decision of the earlier Bench was therefore that the sale of the finished products was not part of the work of the factory and was not connected with it and that that was why reference was made to the earlier decision of the Bombay High Court in *E.S.I. Corporation* v. *C.H. Raman*[5] The later Bench decision in *E.S.I. Corporation* v. *Prabhulal Brothers*[3], is, however, directly to the contrary in so far as it holds that the sale of umbrellas would be connected with the work of the factory, because it is stated:

"It is inconceivable that the work of the factory did not include sale of such umbrellas. If it were otherwise, it would be unrealistic, having regard to the concept of a factory."

The later Bench was bound to follow the decision of the earlier Bench, unless the later Bench felt that the authority

1. (1970) 2 M.L.J. 549.
2. (1961) 1 M.L.J. 143.
3. 86 L.W.101.
4. (1967) 3 S.C.R. 92 : (1968) 1 S.C.J. 374 : A.I.R. 1967 S.C. 1364.
5. (1957) 1 L.L.J. 267.

of the decision of the earlier Bench had been impaired by the decision of the Supreme Court in *Nagpur Electric Light and Power Company Limited* v. *E.S.I. Corporation*[1]. (Incidentally, Veeraswami, C.J., had himself been a party, as a puisne Judge, to the earlier Bench decision.).

17. Mr. M.R. Narayanaswami, however, contends that the decision in *E.S.I. Corporation* v. *Ganapatia Pillai*[2], has not in any way been impaired by the decision of the Supreme Court. I am inclined to agree with this submission. It may be noted that their Lordships of the Supreme Court only distinguished the decision of the Bombay High Court and did not say that it was wrong. Before proceeding further, it is just as well to note that all these decisions were rendered with reference to the definition in section 2 (9) (*i*) of the Act as it stood before it was amended by Act IV of 1966 which came into force on 28th January, 1968. The amendment reads as follows:

> "....and includes any person employed for wages on any work connected with the administration of the factory or establishment or any spart, department or branch thereof or with the purchase of raw materials for or the distribution or sale of the products of the factory or establishment."

Under the amended definition, no doubt, persons engaged in the sale of the products of the factory would come within the meaning of the definition in section 2 (9) of the Act, but the amending Act does not apply to the cases discussed, and that is why there is no reference to the amended definition in any of those decisions. But the fact remains that their Lordships of the Supreme Court did not doubt the correctness of the decision of the Bombay High Court. It may be noted that the decision of the Bombay High Court was rendered on the facts of that case; but the facts of the case in *E.S.I. Corporation* v. *Prabhulal Brothers*[3], must be considered as different, because my Lord has proceeded on the footing that, on the facts of that case, the work of the factory included the sale of umbrellas which were manufactured in the factory and that the proprietors were the same, whose object was to manufacture and sell umbrellas. It is unnecessary to pursue the discussion on this aspect further, for the purpose of our case: suffice it to say that the core of the decision in *E.S.I. Corporation* v. *Ganapatia Pillai*[1], namely, "The work which is the prime factor is the work of the factory", cannot be taken to have been disturbed, and there is some difficulty only about the disposal of the finished product manufactured in the factory. There can be no doubt, however, that the main core of the decision holds good when it has to be applied to the case before us which is a stage antecedent to the work of the factory. In the Bombay case it was pointed out:

> "The work of the factory in the present case began with the collection of raw materials and ended with the production of finished articles".

So according to that decision, the work of the factory would begin, at the earliest, with the collection of raw materials. According to that concept and even other wise, as a matter of common sense, so far as the case before us is concerned, it is difficult to hold that the work of the construction of the building itself can be said to be even work preliminary to the work of the factory. To answer this question we may assume a case where a factory is constructed on vacant premises. Can it ever be said that a person employed in the construction of the factory is an "employee" coming within the meaning of the definition in section 2 (9) (*i*) of the Act. To answer this question it will be convenient to expand clause (*i*) of section 2 (9) as follows:—

(*a*) who is directly employed....on any work of the factory;

(*b*) who is directly employed....on any work incidental to the work of the factory;

(*c*) who is directly employed....on any work preliminary to the work of the factory;

1. (1967) 3 S.C.R. 92 : (1968) 1 S.C.J. 374: A.I.R. 1967 S.C. 1364.
2. (1961) 1 M.L.J. 143.
3. 86 L.W. 101.

1. (1961) 1 M.L.J. 143.

(*d*) who is directly employed....on any work connected with the work of the factory.

18. Now a worker engaged in the construction of a factory cannot be said to be employed on any work of the factory or any work incidental to the work of the factory. It cannot even be said that he is directly employed on any work connected with the work of the factory, because that would suggest that the factory has commenced work and that the work is connected with the work of the factory. If at all such a worker enagaged in the construction of a factory can be brought within the definition of "employee", it can only be on the ground that he is engaged on a work preliminary to the work of the factory. Now, according to the Bombay decision, the work of the factory starts with the collection of the raw materials, and will not apply to an anterior stage, where the building itself is being put up. That seems to me a matter of common sense and also a legitimate construction of the definition. I may add that Mr. Ali Mohamed, also does not seriously dispute (though he would not concede it) that a worker engaged in the construction of a factory will not come within the definition of employee in section 2 (9) (*i*) of the Act; but he contends that the position here is different, because the case before us is not one where a factory is being constructed for the first time. He points out that already there is a factory with in the definition of section 2 (12) of the Act, that the proposed construction is only an extension thereof and submits that therefore it can be said to be a work connected with the work of the factory. I am unable to agree with the contention. The work of the additional construction to house additional spindles will not certainly be work of the existing factory and will not be work incidental to the work of the existing factory. If at all it can be said to come within the meaning of clause (*i*) of section 2 (9), it can only be on the ground that it is work preliminary to the work of the existing factory or that it is a work connected with the work of the existing factory. There can be no doubt that the additional construction is not work connected with the work of the existing factory. The question finally narrows itself to this, namely, whether the work of the additional construction is work preliminary to the work of the existing factory. Here again I do not see why I should not follow the Bombay decision, according to which the work of the factory starts only with the collection of raw materials. If I may say so with respect that is also what a layman would say. The work of the existing factory is the production of yarn which can be produced with the existing spindles, and any work to be called preliminary to the work of the existing factory must relate purely to the yarn which is produced with the existing spindles.

19. Mr. Ali Mohamed, contends that the, workers engaged in the construction of the additional building would be covered by the decision (Ramachandra Iyer, C.J. and myself) in *Thiagarajan Chettiar* v. *E.S.I. Corporation Madurai*[1], I am afraid not. There what was held was that the persons engaged in connection with the existing buildings of the factories like gardeners, building workers, office attender, watchman, etc., would fall within the definition of "employee", even adopting the narrower definition in *E.S.I. Corporation* v. *Ganapatia Pillai*[2]. The case is therefore distinguishable.

20. Equally, in my opinion, Mr. M.R. Narayanaswami is not correct, in contending that the decision of Ramamurthi, J., in *Gnanambikai Mills* v. *E.S.I. Corporaporation*[3], affirmed by Veeraswami, C.J. and Raghavan, J., in L.P.A. No. 7 of 1970 (not yet reported) has concluded the point in his favour. That case dealt with casual workers employed for two or three days altogether and proceeded on the basis that the Act contemplated certain minimum period of work (*See* the definition of contribution period and benefit period.). It was in relation to an existing factory. Here there is no evidence that the workers were casual workers and that the period of their work was less than the contribution period or the benefit period. In the cases cited there is no specific discussion on the point

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1. (1963) 2 M.L.J. 77 : A.I.R. 1963 Mad. 361.
2. (1961) 1 M.L.J. 143.
3. (1970) 2 L.L.J. 233.

which has engaged my attention in this case. The point did not really seem to have been concluded by any authority till now.

21. I therefore hold that any worker engaged in the construction of buildings put up purely to house additional spindles will not be an employee within the meaning of section 2 (9) of the Act. Now, this decision will have to be applied to the facts of the three appeals. In A. A. O. No. 260 of 1968, I find the following admission of a witness for the Mills:

> "The expansion workers are meant for expanding the manufacturing capacity of the mill. The new building works include a rest-house for the workers and a creche for the workers' children. They are for the benefit of the workers of the mill."

This means that besides the work of expansion (for housing additional spindles) a rest-house and a creche were put up which would be for the benefit of even the workers of the existing factory. The rest-house and the creche, for the benefit of the workers of the existing factory, would be covered by the decision in *Thiagarajan Chettiar* v. *E.S.I. Corporation, Madurai*[1], and the workers engaged thereon would be "employees". But the other workers enagaged for putting up new buildings to house the additional spindles would not be "employees". The order of the learned District Judge is set aside and he is directed to make a further enquiry to determine who are the workers who would fall under section 2 (9) of the Act and who are not.

22. In A.A.O. No. 261 of 1968, the evidence of C.P. Ramamurthi, a clerk is Selvaraja Mills Private Limited, shows that, in addition to the construction of the buildings for the installation of additional spindles., they had also put up constructions for housing a yarn mercerising plant but that would be about six furlongs away from Selvaraja Mills. There can be no doubt that the mercerising plant is to improve the quality of the existing yarn, and hence that would be work connected with the work of the existing factory. No doubt, the mercerising plant is about six furlongs away from the Selvaraja Mills, but the decision of the Supreme Court in *Nagpur Electric Light and Power Company Limited* v. *E.S.I. Corporation*[1], would seem to indicate that, even though it is six furlongs distant, it must be said to be work connected with the work of the existing factory. Just as the sub-stations were considered part of the main factory, the work done in the building six furlongs away can be said to be work connected with the work of the existing factory. In addition to this, I find from paragraph 11 of the judgment that some time-office and cycle-shed were also put up for the benefit of the workers already engaged in the manufacturing process of the factory. If that is so, those workers will be employees under section 2 (9) of the Act. Here again the order of the learned District Judge has to be set aside in order that he may determine who are the workers who are engaged purely in connection with the construction of the additional buildings put up for housing the additional spindles. They will have to be excluded from the definition of "employee" and the rest will be employees under section 2 (9).

23. In A.A.O. No. 262 of 1968, the judgment of the learned District Judge shows that the additional construction was purely to house additional spindles and there is nothing contrary to this in the evidence. Hence none of the workers engaged in the construction of the additional buildings would be an employee within the meaning of section 2 (9) of the Act.

24. The appeal will have to be allowed. Accordingly the order of the learned District Judge is set aside and the appeal is allowed.

25. The parties will bear their own costs in the three appeals.

S.J. ——— *A.A.O. 260 directions given;*
A.A.O. 261 directions given.
A.A.O. 262 allowed.

1. (1963) 2 M.L.J. 77.

1. (1967) 3 S.C.R. 92 : (1968) 1 S.C.J. 374 A.I.R. 1967 S.C. 1364.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT.—*P. S. Kailasam and S. Maharajan, JJ.*

The Collector of Customs and Central Excise, Somajiguda, Hyderabad .. *Appellant**

v.

Amruthalakshmi *alias* **Geetha and others** ... *Respondents.*

Customs Act (LII of 1962), *sections* 110, 124—*Seizure of watches—Notice to show cause under section* 110—*Notice given six months after seizure—Action under section* 124—*Confiscation and imposition of penalty—Whether can be validly taken—Scope.*

There is no connection between the exercise of power of confiscation of goods and imposing of penalty and the provision in section 110 of the Customs Act which required the officer to hand over the goods to the owner after the period specified, if no notice under section 124 (*a*) of the Customs Act was given. Section 110 puts a limit to the power of seizure and retention of goods by the officer. When once action was taken under section 124 before the expiry of the period in section 110, he might continue to retain the goods. But the failure to give notice under section 110, did not in any way affect the power of the authorities to proceed with the proceedings for confiscating the goods or imposing any penalty.

Sections 110 and 124 are entirely independent. Section 110 dealt with the right of the officer to retain the seized goods for a specific period and his duty to return them to the possession of the owner from whom they were seized unless action under section 124 had been taken. Section 124 prescribed the procedure under which the goods could be confiscated and penalty could be imposed. All that section 124 required was fulfilling the conditions specified in sub-clauses (*a*), (*b*) and (*c*). [*Para.* 4.]

There was no substance in the contention that if the notice under section 110 was not in accordance with law, the authority under section 124 would have no jurisdiction to proceed with the confiscation proceedings or with the imposition of penalty. [*Para.* 5.]

The conclusion that notice under section 110 (2) and notice under section 124 of the Customs Act should be given within six months from the date of seizure of the goods was not correct. Further the view that a vested right was created in favour of the owner of the goods when a show cause notice under section 124 was not given within six months as provided for under section 110 (2) was also not correct. [*Para.* 7.]

Cases referred to :—

Assistant Collector of Customs v. *Malhotra*, A.I.R. 1972 S.C. 689 ; *Charandas* v. *Assistant Collector of Customs*, A.I.R. 1968 Cal. 28 ; *P. N. Agarwal* v. *Union of India*, (1972) A.L.J. 963 ; *Kunjan* v. *Assistant Collector of Customs*, (1972) K.L.T. 407.

Appeals under Clause 15 of the Letters patent against the Order of the Honourable Mr. Justice Ramaprasada Rao, dated 12th July, 1972 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petitions Nos. 944, 1408, 1409, and 1411 of 1971 respectively presented under Article 226 of the Constitution of India to issue writs of *certiorari* calling for the records in C. No. VIII/10/28/69 Cws. and adjudication Order No. 13/70 Cws. dated 18th August, 1970 on the file of the Respondent therein and to quash the Adjudication order No. 13/70 Cws. dated 18th August, 1970 and the order of sanction for prosecution dated 12th August, 1970 bearing C. No. VIII/10/28/69 Cws. passed by the respondent herein.

The Central Government Standing Counsel, for Appellant.

Aiyar and *Dolia, S. Sunder* and *Mrs. Leelie Seetharaman*, for Respondents.

The Judgment of the Court was delivered by

Kailasam, J.—These appeals arise out of four writ petitions, W.P. Nos. 944 of 1971, 1408 of 1971, 1409 of 1971 and

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*W.A. Nos. 112 to 115 of 1973.
8th October, 1973.

1411 of 1971. The relief asked for was for the issue of a writ of *certiorari* to quash the order of the Collector of Customs dated 18th August, 1970 and 12th August, 1970 directing the confiscation of 450 watches, and levying of penalties, and against the order of the Collector of Customs granting sanction of prosecution against the petitioners under section 135 of the Customs Act.

2. The main contention that was raised before the learned Judge and which found acceptance was that the notice as contemplated under section 110 of the Customs Act was not in accordance with law and as such further proceedings taken by the Collector under section 124 of the Customs Act were illegal and without jurisdiction. The short facts that are necessary may be stated. The watches were seized on 1st June, 1969. The Collector gave a notice on 4th November, 1969 extending the period of notice to 31st May, 1970. He actually gave a show-cause notice on 1st May, 1970, that is more than six months after the seizure of the watches but before the expiry of one year. The contention that was raised was that the requirements under section 110 of the Act had not been complied with, and therefore no further action could be taken by the authorities under section 124 of the Act.

3. Section 110 occurs in Chapter XIII of the Customs Act which relates to searches, seizure and arrest. Dealing with the power of the officers to seize goods, documents and other things, section 110 provides that if the officer has reason to believe that any goods are liable to confiscation, he may seize such goods. The proviso enables the Officer in cases where it is not practicable to seize the goods, to serve on the owner of the goods an order that he shall not remove, part with or otherwise deal with the goods except with the previous permission of such officer. Sub-section (2) enables the officer to keep the seized goods for a period of six months. But when goods are seized under sub-section (1) of section 110 of the Act, if a notice as provided for under clause (*a*) of section 124 is not given within six months of the seizure of the goods, the officer is bound to return the goods to the person from whose possession they were seized. The proviso enables the officer to get an extension of the period of notice from six months to one year by applying to the Collector of Customs.

4. Section 124 occurs in Chapter XIV relating to confiscation and imposition of penalties. Now in dealing with the power of confiscation or imposing penalty, the section provides that no order of confiscating any goods or imposing any penalty on any person shall be made unless the conditions provided for under sub-sections (*a*), (*b*) and (*c*) are fulfilled. Sub-section (*a*), of section 124 requires that a notice in writing informing the owner of the grounds on which it is proposed to confiscate the goods or to impose a penalty should be given and sub-section (*b*) requires that an opportunity of making a representation in writing should be given within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein and sub-section (3) requires that a reasonable opportunity of being heard in the matter should be given. Now section 110 requires that the goods seized directed to be kept in the custody of the owner have to be returned to the person from whose possession they were seized, if no notice in respect thereof is given within six months of the seizure of the goods under clause (*a*) of section 124. If follows, therefore, that if within the period of six months or one year as the case may be no notice has been given under clause (*a*) of section 124, the goods shall be returned to the person from whose possession they were taken. The power to retain the goods is no longer available after the period has expired. We find no connection between the exercise of power of confiscation of the goods and of imposing penalty, and the provision in section 110 which requires the officer to hand over the goods to the owner after the period specified, if no notice under section 124 (*a*) is given. Section 110 puts a limit to the power of seizure and retention of goods by the officer. When once action is taken under section 124 before the expiry of the period as contemplated in section 110, he may continue to retain the goods. But the failure to give notice under section 110 does not in any way affect the power of the autho-

rities to proceed with the proceedings for confiscating the goods or imposing any penalty. Mr. Dolia, the learned Counsel for the respondent, submitted that a valid notice, within the period specified under section 110 is a *sine qua non* for taking action under section 124 of the Customs Act. We do not see any justification for the acceptance of such a contention. These two sections are entirely independent. Section 110 deals with the right of the officer to retain the seized goods for a specified period and his duty to return them to the possession of the owner from whom they were seized unless action under section 124 had been taken. Section 124 prescribes the procedure under which the goods can be confiscated and penalty can be imposed. All that section 124 requires is fulfilling the conditions specified in sub-clauses (*a*), (*b*) and (*c*). In this case the Collector extended the period upto 31st May, 1970 and the show-cause notice was actually given on 1st May, 1970 before the expiry of the extended period. In this case we do not propose to go into the question as to whether the time for issue of a show-cause notice was properly extended or not, for, it does not arise. The proceedings were taken for confiscation of the goods and for imposing a penalty. The petitioners in those proceedings did not contend that the notice under section 110 was not in accordance with law or that as the notice under section 110 was not in accordance with law, proceedings under section 124 were not open to them. In those proceedings, it is already stated, the Collector directed the confiscation of the goods which were seized from the two ladies, and also imposed a penalty on the two owners. That order is the subject matter of appeal to the Central Board of Excise and Customs.

5. The order of confiscation and penalty having been levied by an authority empowered under the Act, it is open to the aggrieved person to take the matter up on appeal which they have done. We are unable to accept the plea that the order of the confiscation or the order of imposing penalty is erroneous or not in accordance with law or without jurisdiction. The question as to whether the extension of time provided for under section 110 for the issuing of a show-cause notice was properly done or not, may be challenged by the aggrieved persons in the appeal before the Central Board of Excise and Customs. We may at once state that we do not find any substance in the contention that if the notice under section 110 is not in accordance with law, the authority under section 124 will have no jurisdiction to proceed with the confiscation proceedings or with the imposition of penalty. In this view, we are unable to see any justification for quashing the order of the Collector confiscating the goods or imposing penalty.

6. We may now refer to two decisions which are very strongly relied on by the respondent in support of his contention that if there is no proper notice under section 110 of the Act, the authorities will not be entitled to proceed with confiscation or imposition of penalty. A reference was made to *Assistant Collector of Customs* v. *Malhotra*[1], where the question that was considered was whether the extension of time granted in the case by the Collector was in accordance with law. The Court held that section 110 contemplated some sort of inquiry and the Collector was expected not to pass extension orders mechanically or as a matter of routine but only on being satisfied that there existed facts which indicated that the investigation could not be completed for *bone fide* reasons within the time laid down in section 110 (2) and that therefore, extension of that period had become necessary. Holding that the Collector cannot extend the time unless he is satisfied on facts placed before him that there is a sufficient cause necessitating extension, the Court proceeded to observe that the order of the Collector extending the period for the issue of a show-cause notice was not valid. The decision does not lend any support to the contention that when once notice under section 110 is not properly given, proceedings under section 124 are not open. On the other hand the passage in paragraph 5 of the judgment would indicate *contra*. The passage is quoted below:

"The section does not lay down any period within which the notice required

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1. A.I.R. 1972 S.C. 689.

by it has to be given. The period laid down in section 110 (2) affects only the seizure of the goods and not the validity of the notice".

Section 124 provides that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose penalty. The passage quoted above, in our view, makes it very clear that notice for taking action under section 124 can be given and no time limit is prescribed for issue of such notice.

7. Mr. Dolia submitted that so far as the case before the Supreme Court is concerned, it arises out of an appeal from the Calcutta High Court and the Bench of the Calcutta High Court allowed the writ petition and quashed the notice under section 124 on the ground that the notice given under section 110 was not in accordance with law and that decision was confirmed by the Supreme Court. On going through the decision of the Bench of the Calcutta High Court which is reported in *Charandas* v. *Assistant Collector of Customs*[1], or that of the Supreme Court in *Assistant Collector of Customs* v. *Malhotra*[2], we find no support for Mr. Dolia's submission. Before the Calcutta High Court, the proceedings under section 124 were attacked on the ground that the person to whom notice was given did not have a proper opportunity for defending himself. The Bench of the Calcutta High Court pointed out that so far as section 110 is concerned, it dealt, not with the issue of notice, but with the seizure of the goods and the return thereof, and in other words, if the provisions were not satisfied, the goods seized had to be returned and that, therefore, since the extension had not been properly granted, the appellant was entitled to the return of the goods. Having said so, the learned Judges of the Calcutta High Court proceeded to point out thus:

> "That by itself may not invalidate the notice itself. For that purpose we have to travel to the next point taken, namely, the nature of the notice which has been issued under section 124 of the said Act. The point taken is that the notice that has been issued is so vague and uncertain that the appellant had no reasonable opportunity of defending himself".

The contention that the aggrieved person had no reasonable opportunity of defending himself was accepted by the Calcutta High Court. The Supreme Court refrained from dealing with the point relating to section 124 and stated thus:

> "We are also not dealing with the question as to whether the notice under section 124 (*a*) was vague and, therefore, void as decided by the Division Bench. That part of the decision of the High Court was not challenged before us, and therefore, we are not called upon to give our decision on that part of the case."

Mr. Dolia contends, that any defect in the notice under section 110 would bar proceedings under section 124 of the Customs Act. On the other hand, the passages cited would indicate that a notice under section 110 is only with reference to the power of seizure and detention of goods and the notice contemplated under section 124 does not require that it should be within a particular time. The learned Counsel relied on certain decisions of other High Courts, namely, *P. N. Agarwal* v. *Union of India*[1] and *Kunjan* v. *Assistant Collector of Customs*[2]. The first decision related to the power under the proviso to section 110 (2) of the Act. The Allahabad High Court held that the power under the proviso to section 110 cannot be exercised without affording an opportunity of being heard being given to the person from whose possession the goods are seized. In dealing with the powers under section 110 (2) the Court observed:

> "It is, therefore, clear that the Collector, Central Excise and Customs was not competent to extend the period of six months mentioned in section 110 (2) of the Customs Act, without giving an opportunity of being heard, to the petitioner, the respondents are,

1. A.I.R. 1968 Cal. 28.
2. A.I.R. 1972 S.C. 689.

1. (1972) A.L.J. 963.
2. 1972 K.L.T. 407.

therefore, bound to return the goods seized under sub-section (1) of section 110 to the person from whose possession they were seized. They are not entitled to retain the 14 items of gold and other articles of foreign origin for purposes of proceeding under section 124 of the Customs Act".

Mr. Dolia would strongly rely on the last sentence, namely, that the authorities will not be entitled to hold articles for purposes of section 124 of the Customs Act and would submit that when once the notice under section 110 fails, the goods will have to be returned and no other provision of the Act can be availed of. We are unable to read the passage in the manner he would like us to read. All that the passages states is that when once time for detention expires, the officer has to return the goods and he will not be permitted to withhold it on the ground that he is contemplating taking action under section 124 of the Act. It does not say that when once there is no proper notice under section 110, action cannot be taken under section 124. The next decision that was relied on by the learned Counsel for the respondent is *Kunjan* v. *Assistant Collector*[1]. That decision also related to requirements under section 110 (2) of the Act.

In paragraph 6 it was observed:

"From the date of seizure the initial period granted under section 110 (2) for the concerned officer to make up his mind as to whether show-cause notice under section 124 should be issued for confiscation of the goods is six months. Thereafter power is given to the Collector to extend the period of six months but that he can do only on showing sufficient cause".

The observation that the concerned officer has to make up his mind as to whether show-cause notice under section 124 should be issued for confiscation of the goods is six months is relied on and it was sought to be contended that after that possession was not taken by the officer and no proceedings under section 124 can be taken. We are unable to read the passage as meaning that if a notice is not given under section 110 (2) within six months, no action can be taken under section 124 of the Act. We have no doubt that on a reading of the provisions of the section itself, the contention of the learned Counsel for the respondent that when there is no proper notice under section 110, proceedings under section 124 are void cannot be upheld. In the result, we find outselves unable to agree with the conclusion reached by the learned single Judge that notice under section 110 (2) and notice under section 124 of the Act should be given within six months from the date of seizure of the goods; nor are we able to accept the view of the learned Judge that a vested right is created in favour of the owner of the goods when a show-cause notice under section 124 is not given within six months as provided for under section 110 (2).

8. For the reasons stated above, the appeals, have to be allowed and the judgment of the learned Judge set aside.

9. So far as the criminal prosecution is concerned we do not see any justification at all for the High Court to interfere. Section 137 of the Act provides that no Court shall take cognizance of any offence under sections 132 to 134 or section 135 except with the previous sanction of the Collector of Customs. The Collector gave the sanction for prosecution of an offence under section 135. The contention is that as the notice under section 124 as contemplated under section 110 is not proper, the owner of the goods is immune from any further proceedings either by way of confiscating or levying penalty or criminal prosecution. On that basis it is next contended that no prosecution could ever lie and the sanction given by the Collector should be quashed. We are of the view that section 110 can only be restricted to the seizure and detention of the goods for the period specified and has nothing to do with the other powers conferred on the authority under section 124 or other provisions of the Act. The submission that no prosecution would lie cannot be accepted.

10. In the result, all the writ appeals are allowed and the writ petitions will stand dismissed. There will be no order as to costs.

S.J. ——— *Appeals allowed.*

1. 1972 K.L.T. 407.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

PRESENT.—*P. S. Kailasam and N. S. Ramaswami, JJ.*

N. D. Kunjappa .. *Appellant**

v.

M. R. V. Guru Rao ... *Respondent.*

Madras Estates Land Act (I of 1908), sections 131, 189—Suit for declaration of title—Ryoti land—Ryot in arrears of rent—Land brought to sale by landholder—Landholder purchasing land himself—Sale whether valid—Application to set aside sale—Jurisdiction of civil Court—Whether ousted.

Under section 189 of the Madras Estates Land Act, 1908, only suits and applications of the nature specified in Parts A and B of the Schedule which can be brought before the Revenue Court, are taken out of the jurisdiction of the civil Court. Surely a suit for a declaration of title and injunction is not one specified in Part A or Part B of the Schedule to the Act of 1908. A suit either for a declaration that a sale under the provisions of the Act of 1908 is void or a suit for setting aside such sale on the ground of illegality is not one provided under Part A or B of the Schedule to the Act of 1908 and therefore in respect of either of such suits, the civil Court's jurisdiction is not ousted. [*Para.* 8.]

Undoubtedly there is no provision in the Act of 1908 for filing an application before the Revenue Court to set aside a sale without depositing the defaulted sum and contending that the sale had been vitiated by material irregularity amounting to illegality. Therefore, it is clear that the civil Court's jurisdiction to entertain a suit to set aside a sale under the provisions of the Act of 1908, outside the scope of section 131 of the Act of 1908 is not ousted. [*Para.* 10.]

Cases referred to :—

Chidambaram Pillai v. *Muthammal*, I.L.R. 38 Mad. 1042; *Rajah of Ramnad* v. *Venkatarama Iyer*, I.L.R. 45 Mad. 890 (F.B.); *Mahalinga Naicker* v. *Vellayya Naicker*, I.L.R. 49 Mad. 490; *Munuswami* v. *Narasappa*, A.I.R. 1941 Mad. 539; *Satyanarayana* v. *Rayalamma*, (1943) 1 M.L.J. 386; *Kandaswami Naicker* v. *Ponnu Naick*, A.I.R. 1950 Mad. 279; *Natarajan* v. *Chandmull Amarchand*, (1971) 1 M.L.J. 474; *S. M. Kadirvelu* v. *Alagappan*, A.I.R. 1934 Mad. 725; *Manickavasaka Thevar* v. *Chidambaram Pillai*, (1940) 1 M.L.J. 20.

* L.P.A. Nos. 34 and 83 of 1969.

5th December, 1973.

Appeals under clause 15 of the Letters Patent against the decree of the Honourable Mr. Justice Alagiriswami dated 13th December, 1968 and passed in S.A. No. 1776 of 1964 preferred to the High Court against the decree of the City Civil Court (Additional Judge), Madras dated 24th February, 1964 and passed in A.S. No. 41 of 1963 (O.S. No. 2791 of 1959) City Civil Court (VI Assistant Judge), Madras.

G. N. Chary, for Appellant.

G. Narayanan, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—These two appeals under the Letters Patent are against the judgment of Alagiriswami, J., in Second Appeal No. 1776 of 1964. The plaintiff in the suit is the appellant in L.P.A. No. 83 of 1969, while the defendant in the suit is the appellant in L.P. A. No. 34 of 1969. The suit out of which these Letters Patent Appeals arise is one for declaration of title and for injunction in respect of a land measuring seven grounds in extent situate in the estate known as Puliyur Shrothriyam. It was a ryoti land and one Abdul Azeez was the ryot. He was in arrears of payment of rent due to the then landholder of the estate in which the land was situated and for the said arrears, the land had been sold under the provisions of the Madras Estates Land Act, 1908, hereinafter referred to as the Act. That sale was as early as 1936. The landholder had himself purchased the holding in the said sale. Later, the landholder as the purchaser of the land had sold the same to a third party and after some intermediary sales, the defendant in the suit has purchased the same.

2. Abdul Azeez, the ryot who had allowed the land to be sold, filed an appli-

cation under section 131 of the Act for setting aside the sale but the same had been dismissed as belated. However, the said Abdul Azeez claiming to be the owner of the land, sold the same in favour of a third party. After some intermediary sales, the plaintiff in the suit has purchased the land from the vendee under the said Abdul Azeez. Thus the plaintiff claimed title to the land through Abdul Azeez, formerly the ryot of the land, and the defendant claimed title through the land-holder who had purchased the land in the sale held under the provisions of the Act. The Courts below have concurrently held that the plaintiff had no title to the property. They also held that the plaintiff was not in possession of the property. Thus the suit came to be dismissed. In the second appeal filed by the plaintiff, Alagiriswami, J., took the view that the sale under the provisions of the Act under which the land-holder himself had purchased the land is a nullity and that therefore the plaintiff who claims the land through the ryot has title to the land. However, the learned Judge accepted the finding of the Courts below that the plaintiff was not in possession of the land on the date of suit and therefore he was not entitled to the relief of injunction against the defendant. The learned Judge gave only a decree declaring the plaintiff's title to the suit property and observed that 'if and when the plaintiff files a proper suit for possession, the question whether it is in time, whether the plaintiff was in possession within twelve years of suit or whether the plaintiff's title has been lost by adverse possession and similar questions may have to be gone into'. The appeal by the defendant L.P.A. No. 34 of 1969 is against the decree granted by the learned Judge declaring the plaintiff's title to the property. L.P. A. No. 83 of 1969 filed by the plaintiff is on the contention that the learned Judge ought to have decreed the suit in its entirety holding that the plaintiff was in possession of the property on the date of suit and that he was entitled to not only the relief of declaration of title but also the injunction.

3. The main question argued in these two appeals is whether the sale held under the provisions of the Act is void as held by the learned Judge. To appreciate the controversy, the facts relating to the sale and the relevant provisions in the Act have to be noted. Under section 111 of the Act, the land-holder is given a right to sell the holding or any part thereof for arrears of rent. Sections 112 to 120 relate to the procedure to be followed in such sales. Under section 112, the land-holder to whom the arrear is due and who wants to avail himself of the powers given under section 111, shall serve on the defaulting ryot a written notice giving the particulars about the arrear. Such notice has to be given through the Collector and the same should inform the defaulter that if he does not pay the amount mentioned in the notice or institute a suit before the Collector, contesting the right of sale, within 30 days from the date of service of the notice, the holding will be sold. In the present case, the land-holder did exercise his right under section 111 and serve a notice on the ryot through the Collector under section 112. The date of the notice is 13th March, 1936 and it has been served on the ryot (Abul Azeez) on 19th March, 1936 as seen from Exhibit B-6, the Register of Land Attachments and Sales.

4. Under section 113 of the Act, the Collector through whom notice under section 112 is served on the ryot, has to give intimation of such service to the land-holder. Such intimation had been given in the present case on 26th March, 1936. Section 114 provides that if the defaulter does not pay the arrear in spite of service of notice under section 112 and also does not institute a suit, the land-holder can file an application to the Collector for sale of the holding. The section also provides that if the ryot had filed a suit contesting the right of the land-holder to sell the land and if in such suit it has been declared that the ryot is liable to pay the amount in whole or in part, then also the land-holder can file the application for sale. Section 115 prescribes the period of limitation for application under section 114.

5. Sub-section (1) of section 115 says that if the ryot had not filed any suit contesting the right of the land-holder to sell the holding, then the application for sale shall be made by the land-holder within forty-five days of the date of service contemplated under section 113.

Sub-section (2) of section 115 prescribes the period of limitation for filing the application for sale in a case where the ryot has filed a suit as contemplated under section 112. In the present case, admittedly the ryot did not file any suit contesting the right of the land-holder to sell the holding for the arrears claimed. Therefore only sub-section (1) of section 115 is relevant for the present purpose. As per that provision the application for sale ought to have been filed within forty-five days from 26th March, 1936, the date on which the intimation of service of notice on the ryot had been given to the land-holder as contemplated under sectior 113. But the application for sale in this case had been filed by the land-holder only on 15th June, 1936 which is a date beyond the period of limitation of forty-five days. One of the contentions on behalf of the plaintiff, who challenges the sale under the provisions of the Act is that the application for sale having been made beyond the period of limitation prescribed under section 115 (1), the Collector to whom the application had been made had no jurisdiction to proceed further in the matter and that therefore the sale held subsequently is *ab initio* void.

6. There is yet another contravention of the provisions of the Act in conducting the sale. Under section 116 of the Act, the Collector who receives the application for sale (under section 114) shall appoint an officer to conduct the sale. Under section 117, the Officer so appointed who is to be the selling officer shall fix a date for sale and cause it to be proclaimed by beat of drum etc. Sub-section (2) of section 117 says that in fixing the date of sale, not less than thirty days shall be allowed from the date on which proclamation is made. In the present case, the proclamation had been made on 25th July, 1936 and the sale had been held on 18th August, 1936. This is in contravention of section 117 (2), for, in fixing the date of sale, the minimum period of thirty days from the date of proclamation had not been allowed.

7. The learned Judge who heard the second appeal had held that this contravention, namely, the contravention of section 117 (2), makes the proceedings a nullity and therefore the sale under the provisions of the Act was wholly void. The learned Judge, however, did not hold that the contravention of section 115 (1), namely, the provision prescribing the period of limitation for filing the application for sale, made the proceedings a nullity. The learned Judge observed:

"Whatever may be said about the propriety of the application for sale made more than forty-five days after the date of intimation to the land-holder of the service of notice on the defaulting ryot, I am of the opinion, that, the sale held before the expiry of thirty days after the order for sale was made, is clearly in contravention of a very important provision of law. These provisions are made for the benefit of the ryot so as to enable him to pay off the arrears of rent, if any, and I am of opinion that the provision in section 117 (2) of the Act is mandatory and therefore the sale held in contravention of that provision should be held to be a nullity with the result that no title passed to the land-holder by the said sale".

8. Before considering the correctness or otherwise of the above view of the learned Judge, we would dispose of the contention raised on behalf of the defendant regarding the maintainability of the suit. The contention is that because of the provisions of the Act, the civil Court had no jurisdiction to entertain the suit out of which the present appeals have arisen. However, we are of the opinion that this contention has no merit. Under section 189 of the Act, only suits and applications of the nature specified in Parts A and B of the Schedule which can be brought before the Revenue Court, are taken out of the jurisdiction of the civil Court. Surely, a suit for declaration of title and injunction is not one specified in Part A or Part B of the Schedule to the Act. It is to be noted that in the present suit, the plaintiff has not even asked for setting aside the sale on the ground of illegality. If the sale is *ab initio* void (and not merely voidable) there is no need for having the sale set aside. In such a case, the plaintiff can ignore the sale and ask for other reliefs. He need not even ask for a declaration that the sale is void. Whatever that be, a suit either for a declaration

that a sale under the provisions of the Act is void or a suit for setting aside such sale on the ground of illegality is not one provided under Part A or B of the Schedule to the Act and therefore in respect of either of such suits, the civil Court's jurisdiction is not ousted.

9. The fact that the ryot filed an application under section 131 of the Act for setting aside the sale and that the said application had been dismissed does not make any difference regarding the question whether the civil Court has jurisdiction to entertain the present suit or not. Admittedly section 131 of the Act is similar to Order 21, rule 89 of the Code of Civil Procedure. It cannot be disputed that there is no provision in the Act similar to Order 21, rule 90 of the Code of Civil Procedure. The fact that the ryot applied under section 131 of the Act (by depositing the arrears due) which application came to be dismissed, has nothing to do with the question that the ryot has a right to file a suit in the civil Court to have the sale set aside on the ground of material irregularity amounting to illegality, much less in respect of a suit in which the sale under the provisions of the Act is treated as void. *Chidambaram Pillai* v. *Muthammal*[1] *Rajah of Ramnad* v. *Venkatarama Iyer*[2] and *Mahalinga Naicker* v. *Vellayya Naicker*[3], support the above view.

10. At one stage, the learned Counsel for the defendant contended that even a suit to set aside the sale on the ground of material irregularity amounting to illegality is one coming under section 189 of the Act and that therefore the civil Court has no jurisdiction to entertain such a suit. The learned Counsel referred to items 27 and 28 in Part B of the Schedule to the Act and contended that while item 27 relates to an application under section 131 of the Act, item 28 relates to an application to set aside a sale generally. The contention is that under item 28, there is no need for the applicant to make the deposit as contemplated under section 131 of the Act, for, such a situation is provided for under item 27 and that, therefore, item 28 should relate to an application to set aside a sale not covered by section 131 of the Act. The argument proceeded, that because item 28 in Part B of the Schedule covers an application to set aside a sale on the ground of material irregularity amounting to illegality (as in the case of Order 21, rule 90, Code of Civil Procedure) section 189 of the Act would be attracted and that the civil Court's jurisdiction to entertain the present suit is barred. The argument is wholly untenable and fallacious on two grounds. First of all the present suit is not one to set aside the sale on the ground of illegality. The plaintiff has proceeded on the footing that the sale was *ab initio* void and if he can prove such a case he can ignore the sale and need not ask for setting it aside. The mere fundamental error in the argument is to construe item 28 of Part B as one outside the scope of section 131 of the Act. In column 2 of Part B, the section of the Act under which the application is to be made is mentioned. It is to be noted that both against items 27 and 28 only section 131 of the Act is mentioned. Item 27 does not relate to an application to set aside a sale under section 131 of the Act, and it is only for depositing the necessary sum for the purpose of setting aside the sale, for which the period of limitation is prescribed as forty-five days. It is under item 28 the period of limitation for filing an application to set aside a sale is prescribed. There can be no doubt that the application contemplated under this item is only one under section 131 of the Act and not otherwise, for, as already mentioned, in column 2, the section is mentioned as 131. Items 27 and 28 read together would show that the defaulter whose holding has been sold can deposit the sum within forty-five days of the date of sale and the period of limitation to file an application to set aside the sale (after making such deposit) is before the grant of a certificate of sale. Undoubtedly there is no provision in the Act for filing an application before the revenue Court to set aside a sale without depositing the defaulted sum and contending that the sale had been vitiated by material irregularity amounting to illegality. Therefore, it is clear that the civil Court's jurisdiction to entertain a suit to set

1. I.L.R. 38 Mad. 1042.
2. I.L.R. 45 Mad. 890 (F.B.).
3. I.L.R. 49 Mad. 490.

aside a sale under the provisions of the Act, outside the scope of section 131 of the Act is not ousted.

11. The learned Counsel for the defendant contended that the decisions reported in *Chidambaram Pillai* v. *Muthamma*[1], *Rajah of Ramnad* v. *Venkata Rama Iyer*[2], and *Mahalinga Naicker* v. *Vellayya Naicker*[3], have to be understood in the light of the decision reported in *Munisami* v. *Narasappa*[4] and according to the learned Counsel, the subsequent Full Bench decision referred to above would show that in the present case, the civil Court has no jurisdiction. This is again wholly untenable. In the case before the Full Bench in *Munisami* v. *Narasappa*[4], a notice under section 112 of the Act had in fact been served on the defaulter. As already seen, on such service of notice, any person having an interest in the holding would have a right of suit before the Collector contesting the land-holder's right of sale. In the case before the Full Bench, what happened was that in spite of service of notice under section 112 of the Act, the defaulter did not file any suit before the Collector contesting the right of the landholder to bring the holding to sale. Therefore, the Full Bench observed at page 544:

> "When he was served by appellant-4 with a notice under section 112 the proper course if he wished to contest the right of sale of the A schedule lands was for respondent 1 to file a suit in the revenue Court.......... He refrained, however, from taking this course and so far as the A schedule lands are concerned, he cannot challenge the validity of the sale in a civil Court".

It should be noted that in the case before the Full Bench the question was not whether the sale was vitiated by any illegality and on that score it was *ab initio* void. The question was whether a ryot who has failed to contest the right of the landholder to bring the holding to sale by filing a suit before the Collector, can agitate such question in the civil Court. The Full Bench pointed out that that question was one falling within the exclusive jurisdiction of the revenue Court and that, therefore, section 189 of the Act would bar the jurisdiction of the civil Court. Therefore this decision has no application at all to the facts of the present case.

12. The substantial question that was argued before us is whether the non-compliance of some of the provisions of the Act made the sale *ab initio* void or whether the sale was only voidable. While the contention on behalf of the plaintiff is that the sale was *ab initio* void as the Collector had no jurisdiction to sell the holding, the contention on behalf of the defendant had been that at the worst, the non-compliance of some of the provisions of the Act would only amount to an illegality which would entitle the affected party to have the sale set aside. The contention is that the plaintiff in this case cannot treat the sale as wholly void and ignore the same and bring a suit for declaration of title.

13. Even though the above question was argued at considerable length, it appears to us that the question is really academic, for, we are of opinion that in either case whether the sale is *ab initio* void or is only voidable the plaintiff has necessarily to fail. If the sale is only voidable, the person affected by the sale (Abdul Azeez, the ryot) ought to have filed a suit in the civil Court to set aside the sale within one year of the date of the sale, under Article 12 (*b*) of the Limitation Act of 1908. (Whatever be the position prior to the amendment of the Act in 1934, under section 116 as amended, the sale is ordered by the Collector and Article 12 (*b*) of the Limitation Act of 1908 clearly covers such sale). No such suit having been filed, the present suit is barred. Even assuming that the revenue sale is *ab initio* void and the plaintiff and his predecessors-in-title can ignore the same, the plaintiff has not established his title to the suit property. It is true that if the revenue sale is void, the defendant's predecessor-in-title, namely, Janakirama Pillai, the landholder who purchased the holding in the revenue sale, did not get title to the holding and the title remained with Abdul Azeez, the ryot; but from the facts of the case there can

1. I.L.R. 38 Mad. 1042.
2. I.L.R. 45 Mad. 890. (F.B.)
3. I.L.R. 49 Mad. 490.
4. A.I.R. 1941 Mad. 539. (F.B.)

be no doubt that the title of Abdul Azeez has been lost by the law of limitation. The first appellate Court has given a clear finding that in pursuance of the sale which is evidenced by Exhibit B-6, Janakirama Pillai, the purchaser, took delivery of the holding as evidenced by Exhibit B-11. The application by Abdul Azeez, the ryot, under section 131 of the Act to set aside the sale was dismissed on 2nd January, 1939. The finding of the learned First Appellate Judge is that even before the dismissal of that application, Janakirama Pillai, the purchaser, had taken delivery of the property which he purchased in the sale held under the provisions of the Act. That means Abdul Azeez had been dispossessed of the property. The above finding of the learned First Appellate Judge has not been disturbed by the learned Judge who heard the second appeal. Under Article 142 of the Limitation Act of 1908, a suit for possession of immovable property has to be instituted within 12 years from the date of dispossession. Abdul Azeez having been dispossessed as early as 1938, neither Abdul Azeez nor his successors-in-interest including the plaintiff can successfully claim that they have still title to the property. Under section 28 of the Limitation Act of 1908 on the expiry of the period of 12 years from the date of dispossession as prescribed under Article 142, the title of Abdul Azeez and his successors-in-interest would get extinguished. There is no dispute that the provisions of the Limitation Act of 1908 would be applicable to the present case, the suit having been instituted very much prior to the coming into force of the Limitation Act of 1963. Even if the suit had been instituted subsequent to the coming into force of the Act of 1963, it would not make any difference, for, if by the operation of the provisions of the Limitation Act of 1908, the plaintiff's title had been extinguished even prior to the coming into force of the Limitation Act of 1963, the mere fact that the suit has been instituted subsequently would not give the plaintiff any better right.

14. Therefore, even if we accept the view of the learned Judge that the sale in this case is *ab initio* void and a nullity, we are unable to see how the plaintiff can be granted a decree for declaration of his title to the suit property. The mere fact that the title of Abdul Azeez had not been lost by the revenue sale (on the footing that the sale was void) does not mean that the plaintiff is entitled to a declaration of his title to the property. Before the plaintiff can get such a decree he has to establish that as on the date of suit he had title. If the plaintiff does not show that himself and his predecessors-in-title had been in possession of the property within 12 years prior to the institution of the suit, he cannot hope to get a declaration of title. As already seen, the clear finding of the first appellate Court is that Abdul Azeez, the original owner of the land had been dispossessed by Janaki Rama Pillai, the purchaser in the sale held under the Act, as early as 1938. It is also the finding of the Court below that the plaintiff was not in possession of the land on the date of suit. Under such circumstances, whether the sale is void or only voidable, the plaintiff should necessarily fail in the present suit. It has to be remembered that the declaration that is prayed for in the present suit is not that the sale is a void one, but it is one in respect of title. Therefore, even if the finding that the sale is void is correct the plaintiff is not entitled to a decree declaring his title to the property.

15. Now coming to the question whether the sale is void or only voidable, it was already noticed that there was infringement of the provisions of the Act in two respects. The first is that the application for sale by the landholder was beyond the period of forty-five days prescribed under section 115 (1) of the Act. The learned Judge who heard the second appeal has not held that this infringement of the provisions affected the sale. However, on behalf of the plaintiff it is contended, on the basis of the decision reported in *Satyanarayana* v. *Rayalamma*[1] that the Collector had no jurisdiction to order the sale as the application by the landholder for sale had not been received within the period of 45 days prescribed in sub-section (1) of section 115 from the date of intimation of service. In that case, Abdur Rahman, J., was of the view that under the provisions of

1. (1943) 1 M.L.J. 386.

the Act before the amendment of 1934 (which applied to the facts of that case) the Collector was acting only as agent of the landholder and that therefore if the landholder had not filed the application for sale within the time prescribed the Collector would not have jurisdiction to proceed further. Even if the above view of the learned Judge that under the provisions of the Act, as it stood before the amendment of 1934 the Collector was acting only as the agent of the landholder is correct, the position is different after the amendment. Under Section 116 as it originally stood, the only duty cast on the Collector was to receive the application from the landholder for sale and to appoint an officer to conduct the sale. He had no other function regarding the sale of the holding, but under section 116 as amended, which amended provision is applicable to the present case, the Collector is the authority who shall determine the extent of the land to be sold, the lots if any in which it shall be sold, the order in which the lots shall be sold and the estimated value of each lot and to order the sale after hearing the parties. As this amended provision makes it clear that it is the Collector who is to order the sale, it cannot be now contended that the Collector is acting only as an agent of the landholder. It is true that under section 111, it is stated that it shall be lawful for the landholder to sell the holding. However, when that section is read with the other provisions of the Act, it is clear that the landholder himself is not given the power to sell the holding but he has only a right to bring the holding to sale. It is the Collector who has the right to order the sale after, hearing the parties. Abdur Rahman, J. has himself pointed out the difference between section 116 as it stood before the amendment of 1934 and the amended provision. It is clear that the learned Judge has taken the view that the Collector was acting only as the agent of the landholder and that therefore he had no jurisdiction to proceed further unless the application for sale by the landholder is within the period of limitation prescribed under section 115, only because, in that case, section 116 as it stood before the amendment, was applicable. From the observations of the learned Judge it appears to us that if the amended section is applicable, he would not have taken the said view.

16. Section 115 only prescribes the period of limitation for filing an application for sale. It is incorrect to say that that section confers jurisdiction on the Collector to order the sale. It is section 116 which confers such jurisdiction on the Collector. If the Collector, in exercise of his jurisdiction under section 116 was prepared to condone the delay in filing the application for sale and decides to proceed further in the matter it cannot be said that he was acting without jurisdiction.

17. The learned Judge who heard the second appeal, as already pointed out, has also not held that the infringement of section 115 (1) of the Act in the application having been made beyond the period of forty-five days made the sale a nullity. We have no hesitation in rejecting the present contention of the learned Counsel for the plaintiff in this respect.

18. We are unable to agree with the view of the learned Judge who heard the second appeal that the infringement of the provision contained in section 117 (2) makes the sale *ab initio* void. As already seen, under the said provision in fixing the date of sale not less than thirty days should be allowed from the date on which publication of the sale had been made. In this case, admittedly only less than thirty days had been allowed. Therefore, this provision has in fact been infringed but the question is whether such infringement makes the sale *ab initio* void. The sale could be held to be void or a nullity only if the sale had been held without jurisdiction. Otherwise, even if a provision of law is transgressed it would be only a material irregularity or illegality. A sale held in transgression of a provision of law may be hit by illegality but it cannot be said that the sale is without jurisdiction. Rubinstein on 'Jurisdiction and Illegality', 1965 Edition, at pages 4 and 5 observes as follows:—

> "The primary question to be dealt with by this book is this: Assuming an act is illegal and assuming it can properly be reviewed, how does the illegality affect its validity?

Other questions that follow from this supposition are: How does the validity or nullity of the decision affect the rights and liabilities of the persons concerned? Can the persons affected by an illegal act ignore and disregard it with impunity? What are the remedies available to the aggrieved parties? When will the Courts recognise the right to compensation for damage occasioned by an illegal act? All these questions revert to the one basic issue: Has the act concerned ever had an *existence* or is it merely a nullity? Existence in this context denotes not only an act which is immune from judicial review but also an illegal act which exists although it may be reviewed and even annulled in appropriate proceedings. Such an illegal act is usually termed as voidable act. Nullity on the other hand, is the result of a purported exercise of an authority which has no legal effect whatsoever, an act which is void *ab initio*".

As already noticed, it is under section 116 of the Act, the Collector is given the power to order sale. It is under the same provision he has to appoint an officer to conduct the sale. In the present case, there is no dispute that the Collector followed the procedure laid down under section 116 and appointed the selling officer. Section 117 prescribes the procedure to be followed by the selling officer. It is there provided that in fixing the date of sale, not less than thirty days shall be allowed from the date on which publication of the sale had been made. It is not correct to say that if the sale had been held without allowing the required number of thirty days from the date of publication, the sale had been held without jurisdiction. The transgression may be a material irregularity or illegality, but we are unable to held that such transgression affects the jurisdiction to sell.

19. In *Kandaswami Naick* v. *Ponnu Naick*[1], Govinda Menon, J., had to deal with a case where no notice under section 112 of the Act had been given to the ryot. The learned Judge held that under such circumstances, the sale was a nullity. But that decision would not help the plaintiff in the present case. Failure to give notice of intention to sell surely goes to the root of the matter as the right of a person can in no way be affected without his being informed of the proceeding. It has always been held even in respect of Court-sales that the Court would get jurisdiction to sell only when the person affected by the proposed sale is given notice of the same. That is so because the property of a person cannot be sold without his being told that it is being sold; vide *Natarajan* v. *Chandmull Amarchand*[1]. But that is not the position in the present case. It is not complained that the ryot had no notice under section 112. The failure on the part of the selling-officer to give an interval of thirty days from the date of publication and the sale cannot be equated with a case where there was no notice at all to the ryot under section 112 of the Act. *S.M. Kadirvelu* v. *Alagappan*[2], is a case similar to the present one, in that, there also there was infringement of section 117 (2) of the Act. In that case, Pandalai, J., has held that the sale was liable to be set aside. It had not been contended and not held that the sale was a nullity and the same can be ignored. *Manickavasaka Thevar* v. *Chidambaram Pillai*[3], is a case where instead of the selling officer who has to sign and issue the proclamation, the Collector himself did it. It was held in that case that the procedure was irregular and the sale was invalid and liable to be set aside. Here again it was not held that the sale was *ab initio* void or a nullity.

20. We are of the view that the infringement of section 117 (2) makes the sale only voidable and not void. However, as we stated earlier, whether the sale is voidable or void, the plaintiff has to necessarily fail because, in either case, the suit is barred by the law of limitation.

21. The result is L.P.A. No. 34 of 1969 is allowed and L.P.A. No. 83 of 1969 is dismissed and the judgment of the trial Court as confirmed by the first appellate Court is restored. There would be no order as to costs.

S.J. —— *L.P.A. No.* 34 *allowed*;
L.P.A. No. 83 *dismissed*.

1. A.I.R. 1950 Mad. 279.

1. (1971) 1 M.L.J. 474.
2. A.I.R. 1934 Mad. 725.
3. (1940) 1 M.L.J. 20.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K.N. Mudaliyar, J.*

Balaraman ... *Petitioner**

v.

State ... *Respondent.*

Essential Commodities Act (X of 1955), sections 7 and 3—Offence under the Act—Accused whether a dealer in rice—Burden of proof—On whom lies—Sanction to prosecute invoking wrong provision of law vitiated.

Where an order sanctioning the prosecution of the accused had invoked a wrong provision of law, namely, the Madras Paddy and Rice Dealers (Licensing and Regulation) Order, 1968 instead of the Movement Control Order, 1968, such sanction order is vitiated. [*Para.* 4.]

Unless there is a specific provision in the statute shifting the burden of proof to the petitioner, just as one finds in the Prevention of Corruption Act (Central Act II of 1947) as amended, it is wrong in law to expect any proof from the accused about his defence that he is not a dealer. The burden remains and continues to remain always on the prosecution to prove the case against the accused that he is a dealer except in cases where the statute provides for the contrary position. [*Para.* 7.]

Cases referred to :—

In re: *Veerasikku and another,* (1971) L. W. (Crl.) 69 ; In re, *Karuppannan and another,* (1971) L.W. (Crl.) 161.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the District Magistrate of Chingleput in S.T.C. No. 35 of 1971.

R. Natarajan of *M/s. Jan* and *San* for *K. Santhanam,* for Petitioner.

Public Prosecutor, for State.

The Court made the following

ORDER:—Balaraman is the accused-petitioner who questions the propriety and the legality of the order passed by the District Magistrate (J), Chingleput convicting him of the offence under section 7 of the Essential Commodities Act, 1955, read with section 3 of the same Act, for contravening clause 3, sub-clauses (1) and (2) of the Madras Paddy and Rice Dealers (Licensing and Regulation) Order, 1968. The accusation against him was that on 27th February, 1969, at about 20-00 hours, at G.N.T. Road, Red Hills, opposite to the bus stand, the petitioner and seven others (already acquitted) were found transporting 55 bags of sirumani paddy in a lorry MDS. 5378 from Nellore side to Red Hills which is in Saidapet Taluk and which is a notified area, without a valid permit.

2. P.W. 1 is the Head Clerk in the Civil Supplies section of the Collectorate at Kanchipuram, who proved the sanction order from the Collectorate. P.W. 1 further stated that the Inspector of Police, Food Cell, C.I.D. (P.W. 2) sent a report to the Collector, stating that Balaraman and seven others had possessed paddy in excess of two quintals and that they were transporting 55 bags of paddy in a lorry MDS. 5378. P.W. 2 is the Inspector, who speaks to the seizure of the paddy from the lorry MDS. 5378 coming from Nellore side at a good speed, loaded with gunny bags, which were seized after the lorry crossed Padianallur check-post and went inside Red Hills, a notified area. The petitioner (accused 1) was found to be the driver of the lorry. P.W. 2 speaks to the fact, of submitting area report to the Collector of the Chingleput District at Kanchi requesting sanction, on 26th April, 1969.

3. We have already noticed that P.W. 1 has proved the contents of Exhibit P-1 which is the sanction order.

4. The Government Pleader was given notice of this matter when the criminal revision case came on for admission and it was represented by the Government Pleader that the Inspector of Police, Food Cell, mentioned about the contravention of the Madras Paddy and Rice Dealers Movement Control Order, 1968 so far as the first accused (petitioner herein) was concerned. The said letter,

* Crl.R.C. No. 514 of 1972 and
Crl.R.P. No. 499 of 1972. *8th September,* 1972.

addressed by the Inspector of Police (P.W. 2) to the Collector of Chingleput has not been proved in this case. Acting on the representation made by the Government Pleader, that so far as the petitioner is concerned, the allegation in the report of the Inspector is about the petitioner contravening the Madras Paddy and Rice Movement Control Order, 1968. I am of the view that the Collector was clearly wrong in according sanction to the prosecution of the petitioner for contravening clause 3. Sub-clauses (1) and (2), of the Madras Paddy and Rice Dealers (Licensing and Regulation) Order, 1968. The sanction order itself is vitiated by the wrong invocation of the Madras Paddy and Rice Dealers (Licensing and Regulation) Order, 1968, instead of the Movement Control Order, 1968. On this ground alone, I am bound to acquit the petitioner of the alleged offence under section 7 read with section 3 of the Essential Commodities Act, and clause 3, sub-clauses (1) and (2) of the Madras Paddy and Rice Dealers (Licensing and Regulation) Order, 1968.

5. The appellate order of the District Magistrate (j) is attacked on another ground, *viz.*, that one instance of possession of paddy by the first accused cannot bring the act of the first accused within the ambit of the signification of the word "dealer", and in support of this argument, the learned Counsel cited the ruling of this Court in *Veerasikku and another*, In re[1] and *Karuppannan and another*, In re[2].

6. Even acting on the testimony of P.W. 2 who stated that the 55 bags of sirumani paddy found in the lorry M.D.S 5378 were in the possession of the petitioner. I am unable to hold that the petitioner is a dealer within the meaning of sub-clauses (1) and (2) of clause 3 of the Madras Paddy and Rice Dealers (Licensing and Regulation) Order, 1968.

7. I have myself perused the order of the District Magistrate (J), Chingleput. In paragraph 7, the learned Magistrate has considered the argument of the learned Counsel for the defence that the prosecution has not proved that the accused is a dealer and that one instance as admitted by the Inspector in his evidence, is not sufficient to prove that the petitioner is a dealer. The learned Magistrate clearly erred in shifting the burden of proof to the 1st accused for proving that he is not a dealer. Unless there is a specific provision in the statute shifting the burden of proof to the petitioner, just as one finds in the Prevention of Corruption Act (Central Act II of 1947) (as amended), it is wrong in law to expect any proof from the accused about his defence that he is not a dealer. The burden remains and continues to remain always on the prosecution to prove the case against the accused that he is a dealer except in cases where the statute provides for the contrary position.

8. The learned District Magistrate was clearly wrong in assuming that the onus shifts to the accused for proving that he is not a dealer. This is another grave illegality which vitiates the conviction of the petitioner.

9. Besides, I find that the accused has stated in his statutory explanation, when examined under section 342, Criminal Procedure Code, that the paddy found in the lorry belonged to him. In view of his plea claiming the ownership of the paddy seized by P.W. 2, the Inspector, I have no hesitation in not merely acquitting the accused-petitioner of the offence under section 7 read with section 3 of the Essential Commodities Act and clause 3, sub-clauses (1) and (2) of the Madras Paddy and Rice Dealers (Licensing and Regulation) Order, 1968, but also in directing the return of the market value of the paddy seized by P.W. 2.

10. The Revision Petition is allowed.

S.J. ——— *Petition allowed.*

1. (1971) L.W. (Crl.) 69.
2. (1971) L.W. (Crl.) 161.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N. Krishnaswamy Reddy, J.*

R. Natesan and others .. *Petitioners**

v.

State .. *Respondent.*

Southern States (Regulation of Export of Rice, Order (1964), *clause* 3-*A—Seizure of rice in belt area—Accused claiming benefit of the proviso to clause* 3-*A of the Order of* 1964—*Burden of Proof—On whom lies—Evidence Act* (*I of* 1872), *section* 106—*Scope of section.*

Whenever the accused gets the benefit of an exception it is for the accused to show how he is entitled to get the benefit of that exception. This is the normal rule. [*Para.* 11.]

Though the prosecution is not relieved of its duty of proving its case, yet section 106 of the Evidence Act provides that in exceptional cases where it would be impossible or at any rate disproportionately difficult to prove the particular fact and the same fact is pre-eminently or exceptionally within the knowledge of the accused and which he could prove without difficulty or inconvenience, it is the duty of the accused to prove such fact. [*Para.* 14.]

Where the accused were found transporting paddy without permit in a belt area it was the duty of the accused to have proved or at least placed the facts before the Court to get the benefit under the proviso to clause 3-A of Southern States (Regulation of Export of Rice) Order, 1964. It is particularly so as the accused alone should have had knowledge as to wherefrom and whereto they were transporting the paddy and they should have proved or at least stated what was within their knowledge. [*Para.* 17.]

Cases referred to :—

Shambhu Nath v. *State of Ajmer*, A.I.R. 1968 Guj. 163; *Jethalal* v. *State*, A.I.R. 1956 S.C. 404; *Shambhu Nath* v. *State of Ajmer*, 1956 S.C.J. 429; (1956) 2 M.L.J. (S.C.) 1: A.I.R. 1956 S.C. 404.

*Crl.R.C. No. 21 of 1971 and
Crl.R.P. No. 13 of 1971. 20*th December*, 1972.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional First Class Magistrate (J), Padmanabhapuram dated 26th September, 1970 and passed in S.T.C. No. 239 of 1970.

S. Ganapathy Subramania Iyer, for *P. Ananthakrishna Nair*, for Petitioners.

The Assistant Public Prosecutor on behalf of State.

The Court made the following

ORDER.—This revision has been filed by accused 3 to 5 in S.T.C. No. 239 of 1970 on the file of the Additional First Class Magistrate, Padmanabhapuram, who were convicted under section (1) (*a*) (ii) of the Essential Commodities Act read with clause 3-A of Southern States (Regulation of Export of Rice) Order, 1964 and sentenced to pay a fine of Rs. 300 each, by the Additional First Class Magistrate. Accused 1 and 2 who were also convicted and sentenced to pay a fine of Rs. 300 each, have not challenged the conviction.

2. The prosecution case is briefly this: P.W. 2 Natarajan, the Sub-Inspector of Police (Food Cell) C.I.D., Nagercoil, was patrolling the belt area in Kanyakumari District at a place called Padmanabhapuram at about 5 A.M., on 25th March, 1970. P.W. 1, Hasan Mian, a Police constable, attached to the Food Cell was also with P.W. 2. They saw a lorry M.D.U. 8834 (M.O. 1) coming on the road from south to north. P.W. 2 intercepted that lorry and checked it. Accused 1 to 5 were all in the lorry. Accused 1 was the driver and accused 2 was the cleaner. Accused 3 was the owner of the paddy. Accused 4 and 5 were coolies engaged for loading and unloading the rice bags. The lorry was loaded with 85 bags of paddy. The accused had no permit to transport paddy in the belt area. P.W. 2, therefore, recovered the paddy bags and seized the lorry. The paddy bags were handed over to the Special Deputy Tahsildar (R) Warehouse Nagercoil. P.W. 3, Gopalakrishnan, the Assistant Director

of Survey and Land Records stated that the place where the lorry was intercepted is about 11 miles from the nearest point of the Kerala border.

3. When the accused were questioned, they denied totally.

4. The learned Magistrate held that the accused were transporting paddy bags within the belt area without permit and found all the accused guilty for having contravened clause 3-A of the Southern States (Regulation of Export of Rice) Order, 1964. 85 bags of paddy seized by the Police were forfeited to the State. So far as the lorry was concerned, the learned Magistrate stated in his judgment that it would be disposed of after holding a separate enquiry.

5. Sri Ganapathi Subramania Iyer, the learned Counsel appearing for the accused-petitioners contended that the prosecution has not proved that the accused were transporting 85 bags of paddy within the belt area and that since the lorry was found in a village called Padmanabhapuram and since transporting the paddy from one place to another place within the village is not prohibited, the conviction is not sustainable. It is therefore, necessary to note the relevant provisions of the Southern States (Regulation of Export of Rice) Control Order, 1964 (hereinafter called "the Order.")

6. Clause 3-A, so far as it is relevant, runs as follows:—

> "Restrictions on transport of rice to or within the border area. No person shall transport, attempt to transport or abet the transport of rice.
>
> (*a*) to any place in the border area from any place outside that area; or
>
> (*b*) from any place in the border area to any other place in that area;
>
> except under and in accordance with a permit issued by the State Government or any officer authorised by that Government in this behalf:
>
> Provided that nothing contained herein shall apply to the transport of rice—
>
> (*i*) ....
>
> (*ii*) ....
>
> (*iii*) ....
>
> (*iv*) within the same town or village in 'border area' ...."

7. It is, therefore, clear from clause 3-A (*b*) that the transport of rice from any place in the border area to any other place in that area is prohibited. In the Explanation to clause 3-A 'border area' is defined as the area which is within the fifteen mile belt inside a specified area and adjoining any other specified area.

8. It is the evidence of P.W. 3 that the place where the lorry was intercepted was 11 miles from the nearest point of the State of Kerala which is the adjoining specified area to the State of Madras. Therefore, there cannot be any doubt that the place where the lorry was intercepted while coming on the road was within the belt area and that, in any event, it could be held that the transport of paddy was at least from one point in the belt area to another point in that area. I, therefore, do not see any point in the contention raised by the learned Counsel that the prosecution has not proved that the accused transported the rice from one place in the belt area to another place in that area.

9. But the substantial question to be considered is whether the accused would get the benefit of the proviso to clause 3-A. Under the proviso to the said clause, it is stated that nothing contained therein shall apply to the transport of rice within the same town or village in the border area. It is contended by the learned Counsel that since the lorry was found, even according to P.W. 2, in the locality of Padmanabhapuram which is a village and that as there is nothing to show from the evidence of the prosecution that the transport of paddy was not within the village of Padmanabhapuram, the accused would have the benefit of this proviso. On the point, the learned Magistrate has found that the burden of proof is on the accused to show that they were transporting the rice from one place to another within the village of Padmanabhapuram and that that burden was not discharged by the accused as required under section 14 of the Essential Com-

modities Act (hereinafter called 'the Act'). Sri Ganapathi Subramania Iyer, learned Counsel for the petitioner contended that section 14 of the Act runs thus:

> "Where a person is prosecuted for contravening any order made under section 3 which prohibits him from doing any act or being in possession of a thing without lawful authority or without a permit, licence or other document, the burden of proving that he has such authority, permit, licence or other document shall be on him".

10. As pointed out by the learned Counsel, the burden of proof is restricted under this section only in cases where a person is prosecuted for not having any permit, licence or other document and not to other matters. In such a case, the burden of proving that he has such permit, licence or other document is on the accused. It is the case of the prosecution that the accused should have had permit to transport the paddy from one place to another within the belt area and that the accused did not have a permit to transport the paddy and that in such a case, it is for the accused to show that he had permit as required under section 14 of the Act. It is not the case of the accused that they had permit to transport paddy. But in a case where the Proviso applies, namely, transport of rice within the same town or village in the border area, that does not require any permit, Section 14 of the Act will not apply. Where no permit is necessary, the question of burden of proof does not arise at all.

11. Now the question is whether the accused were transporting the paddy within the village of Padmanabhapuram in the border area. When the lorry was intercepted, it was actually proceeding on the road towards the Kerala border. I am of the view that though section 14 of the Act would not apply to this case, it is for the accused to show or at least state when they were questioned in Court, that they were transporting paddy from one point to another point within the village of Padmanabhapuram. As already observed, their case is one of absolute denial. It is impossible for the prosecution, especially when the village happens to be a small village and when the lorry was proceeding through that village to show that the transport was not within the village. The evidence in those circumstances would be only of a negative aspect. In such a case, the investigating Officer must enquire all the villagers to find out whether any lorry was transporting paddy within the village. Though the accused in such circumstances may not prove it, but at least they must have stated either before the police who intercepted or at least in the Court that they were transporting the paddy within the village of Padmanabhapuram. If the accused had stated so before the police, one would normally expect the police to verify whether such statement was true and then let in either positive or negative evidence as the case may be. Whenever the accused gets the benefit of an exception and in this case claiming exception by sub-clause (*iv*) or the proviso to clause 3-A of the Order, it is for the accused to show how he is entitled to get benefit of that exception. This is the normal Rule.

12. Even otherwise, under section 106 of the Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Whether a fact is especially within the knowledge of any person will depend upon the circumstances of each case and it requires a commonsense approach.

13. In this case, it would not have been possible for the Investigating Officer to find out whether the transport was within the village of Padmanabhapuram unless, as already pointed out he exhausted making enquiry of all the villagers in the village to let in evidence. This is not at all practicable. Would this be expected to be done, especially when a person who could have had knowledge was available to state wherefrom and whereto he was transporting and he did not say so? When the paddy was transported, there must have been someone in the lorry, at least the driver. That someone who was in the lorry must have had the knowledge as to wherefrom the lorry was proceeding and also the destin-

ation. Therefore, in a case like this, it was the accused who should have had knowledge about the transport of rice from one place to another and it was their duty to have disclosed their case to get the benefit of the proviso.

14. In the decision in *Shambhu Nath* v. *State of Ajmer*[1], the Supreme Court considered the scope of section 106 and laid down the following principles:

> "Section 106 is an exception to section 101. The latter with its illustration (*a*) lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are " especially " within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge".

It is clear from this observation that though the prosecution is not relieved of its duty of proving its case, yet section 106 provides that in exceptional cases where it would be impossible or at any rate disproportionately difficult to prove the particular fact and the same fact which is pre-eminently or exceptionally within the knowledge of the accused and which he could prove without difficulty or inconvenience it is the duty of the accused to prove such fact.

15. In the instant case, as already pointed out by me, it would be impossible and impracticable for the prosecution to prove that the accused were not transporting the paddy within the village of Padmanabhapuram. The accused alone would have known about it and it was for them to have proved that they were transporting the paddy within the village of Padmanabhapuram.

1. 1956 S.C.J. 429: (1956) 2 M.L.J. (S.C.) 1: A.I.R. 1956 S.C. 404.

16. Mr. Ganapathi Subramania Iyer relied upon the decision in *Jethlal* v. *State*[1]. Even though in that case it was held that section 106 of the Evidence Act would not have application to that case, the Court observed that section 106 cannot come into play where the fact concerned is such as is capable of being known not only by the accused but also by others. The decision in *Shambhu Nath* v. *State of Ajmer*[2], which was considered earlier by me, has been followed in that case.

17. The accused denied the case of the prosecution totally and they have not even stated as to wherefrom they were taking the paddy in the lorry and to which place. Therefore, I am of the view that it was the duty of the accused to have proved or at least placed the facts before the Court to get the benefit under the proviso and also I am of the view that the accused alone should have had knowledge as to wherefrom and whereto they were transporting the paddy and that they should have proved or at least stated what was within their knowledge.

18. I agree with the finding of the learned Magistrate that the accused were transporting the paddy within the border area without permit and that it was not shown that they were transporting the paddy from one place to another place within the village of Padmanabhapuram. The conviction is confirmed. The sentence of fine of Rs. 300 imposed on each of the petitioners, in the circumstances, cannot be said to be excessive. The sentence of fine is also confirmed.

19. In the result, the revision petition is dismissed.

S.J. — *Petition dismissed.*

1. A.I.R. 1958 Guj. 163.
2. 1956 S.C.J. 429 : (1956) 2 M.L.J. (S.C.) 1: A.I.R. 1956 S.C. 404.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. N. Mudaliyar, J.*

Manilingan .. *Petitioner**

v.

Jayarama Gounder .. *Respondent.*

Constitution of India (1950), *Article* 134 (1) (c)—*Application for grant of certificate for leave to appeal to Supreme Court—Criminal appeal to High Court under section* 417 (3), *Criminal Procedure Code* (*V of* 1898)—*Conviction and sentence—Pre-requisite to application for leave to appeal to Supreme Court—Practice.*

Accused convicted by the High Court in appeal under section 417 (3), Criminal Procedure Code, must surrender to undergo the sentence, before the High Court can entertain any application for grant of certificate for leave to appeal to the Supreme Court.

Case referred to:—

Kuttino alias *Mohammad Unni*, In re, Crl. R.C. No. 516 of 1967.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to dispense with the requirement of surrender to sentence and consider the application for grant of certificate for leave to appeal to Supreme Court of India against the conviction and sentence in C.A. No. 902 of 1971 on the file of the High Court, S.C. P. No. 1 of 1973 presented to the High Court under Article 134 (1) (*c*) of the Constitution of India to grant leave to the petitioner therein to appeal to the Supreme Court of India against the judgment of the High Court dated 20th December, 1972 in C.A. No. 902 of 1971 in criminal appeal preferred to the High Court under section 417 (3), Criminal Procedure Code, against the acquittal of respondent-accused therein of an offence under section 408, Indian Penal Code, by the Sub-Divisional Magistrate, Polur in C.C. No. 1765 of 1971 on his file.

A. Nagarajan, for Petitioner.

Narayanaswami, for Respondent.

The Court made the following

ORDER.—I am bound by the practice prevailing in this Court, which is embodied in the judgment of Krishnaswamy, Reddy, J., in (In re, *Kittimo* alias *Mohmmed Unni*)[1], wherein it is stated that the accused must surrender to undergo the sentence imposed on him by this Court before any application can be entertained. In my view, S.C.Crl.M.P. No. 2 of 1973 is incompetent in law. Therefore, S.C. Crl. M.P. No. 2 of 1973 is dismissed.

S.J. ——*Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam and N. S. Ramaswamy, JJ.*

R.M.S. Shanmugam Chettiar (deceased) and others .. *Appellants**

v.

Gian Cheng Keit *alias* **Gian Hiam (W), through her power agent Chakravarthi Doraiswami** .. *Respondent.*

Civil Procedure Code (*V of* 1908), *section* 44 (*A*)—*Foreign Exchange Regulation Act* (*VII of* 1947), *sections* 5 *and* 21 (3)—*Scope—Foreign decree—Whether prior sanction from Reserve Bank or Central Government necessary for transmission of the same to the executing Court.*

Foreign Regulation Act, section 5 totally prohibits making of any payment to or for the credit of any person resident outside India without the necessary permission as contemplated under the section. The words "any judgment or order for the payment of any sum" have to be read together. The sub-section specifically says that no steps shall be taken for the purpose of enforcing such judgment for payment of money to the decree-holder residing outside Inoia. [*Para.* 2.]

On a plain reading of section 21 (3) (*a*) and (*b*) it is clear that execution of a judgment by a person outside India can-

* S.C. Crl. M.P. No. 2 of 1973 and S.C.P. No. 1 of 1973. *5th January*, 1973.

1. Crl. R.C. No. 516 of 1967.

* A.A.O. No. 283 of 1969. *13th February*, 1973.

not be levied without obtaining the necessary permission as contemplated by the Act. [*Para.* 2.]

Though a resident outside India can file a suit for recovery of money without the prior permission of the Reserve Bank or the Central Government, as the case may be, he should necessarily obtain such permission before levying execution for the recovery of money. [*Para.* 2.]

Even so, the mere filing of the certified copy of the judgment of a foreign Court and praying for transmission of the same to the executing Court cannot be said to be a step for enforcing the judgment requiring such permission. [*Para.* 3.]

Case referred to:—

Lobe v. *Fatehkhan*, (1972) 1 M.L.J. 41: 84 L.W. 753 (i): A.I.R. 1972 Mad. 323.

Appeal against the order of the District Court, Ramanathapuram at Madurai in E.A. No. 13 of 1967 in suit No. 12 of 1965, High Court of Singapore.

Gopalachari and *G. Krishnan*, for Appellants.

King and Patridge, for Respondents.

The Judgment of the Court was delivered by

N. S. Ramaswami, J.—This civil miscellaneous appeal is against the order of transmission made by the learned District Judge, Ramanathapuram. The respondent before us is a resident of Singapore. He obtained a decree for money in the High Court of Singapore against the appellants in this Civil Miscellaneous Appeal. A certified copy of the decree passed by the High Court of Singapore was filed before the learned District Judge, Ramnad at Madurai, under section 44 (A), Civil Procedure Code, with a prayer that the decree may be transmitted to the Court of the Subordinate Judge, Devakottai, for execution. The appellants before us who are the judgment-debtors raised various objections to the abovesaid application filed by the decree-holder. The learned District Judge, Ramnad overruled all the objections and ultimately by his order dated 11th July, 1969 ordered transmission of the abovesaid foreign decree to the Court of the Subordinate Judge, Devakottai. Now, the judgment-debtors in this civil miscellaneous appeal have raised various contentions. However the learned Counsel for the judgment-debtors-appellants raised only one contention before us and that is that the decree-holder was debarred in filing the application before the District Judge, Ramnad, under the provisions of the Foreign Exchange Regulation Act. The contention is, without prior permission of the Reserve Bank or the Central Government under the relevant provisions of the Foreign Exchange Regulation Act, no execution could be levied by the decree-holder who is a foreigner. Sections 5 and 21 of the Foreign Exchange Regulation Act are the relevant provisions regarding this point. Section 5 as far as it is material for our purpose is as follows:

"Save as may be provided in and in accordance with any general or special exemption from the provisions of the sub-section which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in India shall—

(*b*) make any payment to or for the credit of any person resident outside India..................

(*c*) make any payment to or for the credit of any person by order or on behalf of any person resident outside India.............."

Section 21 (3) of the said Act as far as it is material for our purpose is as follows:

(3) Neither the provisions of this Act nor any term (whether expressed or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which apart from the said provisions and any such term, would be due whether as a debt, damages or otherwise, but—

(*a*) the said provisions shall apply to sums required to be paid by any judgment or order of any Court as they apply in relation to other sums; and (*b*) no steps shall be taken for the pur-

> pose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid; and.........."

The contention of the learned Counsel for the judgment-debtors-appellants is that reading sections 5 and 21 of the Act, though a suit for money may be filed in any Court in India by a resident outside India without obtaining the previous permission of the Reserve Bank or the Central Government, as the case may be, no execution can be levied by such foreigner without obtaining such permission. On the contrary, the learned Counsel for the decree-holder-respondent contends that the provisions of the Act do not bar even the levy of execution of decree for money even though the decree-holder may be a resident outside India, but permission from the Reserve Bank or the Central Government would have to be obtained only before the decree-holder wants to draw the money from the Court. We are of the opinion that the contention of the learned Counsel for the respondent-decree-holder overlooks the specific provisions contained in sub-clauses (*a*) and (*b*) of sub-section (3) of section 21, quoted earlier.

2. Section 5 totally prohibits making of any payment to or for the credit of any person resident outside India without the necessary permission as contemplated under the section. Sub-section (3) of section 21 is in the nature of an exception to the abovesaid provision contained in section 5, for, this sub-section says that legal proceedings for recovery of money can be taken even without obtaining the necessary permission from the Reserve Bank or the Central Government. But, then sub-clauses (*a*) and (*b*) of the abovesaid sub-section (3) are in the nature of exception. Sub-clause (*a*) makes it clear that in spite of what is stated in sub-section (3) the provisions of the Act (the prohibition under section 5 of the Act) shall apply to sums required to be paid by any judgment or order of any Court as they apply in relation to other sums. Then, sub-clause (*b*), says that no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply. The learned Counsel for the decree-holder contends that sub-clause (*b*) would apply only to cases where the decree-holder prays for payment out and not to execution petitions themselves. The learned Counsel is not right. The words "any judgment or order for the payment of any sum" have to be read together. The words "for the payment of any sum" qualify the words "any judgment or order". The sub-section specifically says that no steps shall be taken for the purpose of enforcing such judgment, *viz.*, a judgment for the payment of any sum. Undoubtedly, the judgment in question is one for payment of money and the decree-holder is a resident outside India. No steps shall be taken for the purpose of enforcing this judgment without obtaining the necessary permission of the Reserve Bank or the Central Government. In *Lobo* v. *Fatehkhan*[1], one of us had to consider a similar question. It was held there that execution of a decree by a resident outside India cannot be levied before obtaining the necessary permission of the Reserve Bank or the Central Government. On a plain reading of section 21 (3), sub-clauses (*a*) and (*b*) we are satisfied that execution of a judgment by a resident outside India cannot be levied without obtaining the necessary permission as contemplated under the various provisions of the Act. The learned Counsel for the decree-holder-respondent referred to the judgment of Ismail, J., in W.P. No. 86 of 1968. That writ petition was filed by a judgment-debtor contending that before a decree-holder who is a resident outside India gets the necessary permission from the Reserve Bank under the provisions of the Act, the (judgment-debtor) was entitled to be heard by the Reserve Bank authorities and the permission granted by the Reserve Bank without he being so heard was bad. The learned Judge rightly rejected such a contention and dismissed the writ petition. We are unable to see how this decision has any relevance to the present case. Here we

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1. (1972) 1 M.L.J. 41 : 84 L.W. 753 (1) : A.I.R. 1972 Mad. 323.

are not concerned with the question whether the judgment-debtor has any right to be heard by the Reserve Bank authorities before granting the necessary permission under the Act. We are concerned with the question whether the decree-holder who is a resident outside India can enforce the judgment before obtaining the necessary permission of the Reserve Bank as per the provisions of the Act. As we said earlier, we are quite clear that though a resident outside India can file a suit for recovery of money, without the prior permission of the Reserve Bank or the Central Government, as the case may be, he should necessarily obtain such permission before levying execution for the recovery of the money.

3. Even so, the judgment-debtors-appellants cannot get any relief as far as the present civil miscellaneous appeal is concerned. The order appealed against is one under section 44 (A), Civil Procedure Code, for receiving the foreign judgment and transmitting the same under section 39, Civil Procedure Code to the Court of the Subordinate Judge, Devakottai for execution. The decree-holder cannot be said to have taken steps for enforcing the judgment as contemplated under sub-clause (*b*) of sub-section (3) of section 21 of the Act in filing the certified copy of the foreign judgment in the Court of the District Judge, Ramnad with a request that the same may be transmitted to the Court of the Subordinate Judge, Devakottai. The Court of the Subordinate Judge, Devakottai, is going to be the executing Court. Undoubtedly, the decree-holder cannot take steps to proceed against either the person or the property of the judgment-debtor for the recovery of the money under the judgment without getting the necessary permission as contemplated under the Act. But, we are quite satisfied that the steps so far taken by the decree-holder do not come within the purview of sub-clause (*b*) of section 21 (3) of the Act, for the mere filing of the certified copy of the judgment of the foreign Court and praying for transmission of the same to the executing Court cannot be said to be a step for the enforcing of the judgment as contemplated under the abovesaid provisions. Therefore, the civil miscellaneous appeal fails.

4. The learned Counsel for the judgment-debtors-appellants raised another point, *viz.*, that the decree-holder has given the rate between the Malayan dollar and the Indian rupee wrongly and that has got to be corrected. But, that question is not before us. The only order that is appealed against is the order transmitting the decree to the Court of the Subordinate Judge, Devakottai. We are concerned only with the question whether that order is legal or not. As we said earlier, there is nothing wrong about that order. Therefore, the civil miscellaneous appeal has to be dismissed. The question as to the correct exchange value has to be agitated in the proper forum. The civil miscellaneous appeal is dismissed. There will be no order as to costs.

P.S.P. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, C.J. and V. V. Raghavan, J.*

K. M. Adam .. *Appellant**

v.

Gopalakrishnan (minor) represented by mother and next friend Uma .. *Respondent.*

Hindu Adoptions and Maintenance Act (LXXVIII of 1956), *sections* 20 (2) *and* 2 *—Scope—Maintenance—Claim by minor illegitimate son of Muslim by Hindu concubine—Muslim law—Father not bound under that law —Liable under section* 20 (2) *of the Act.*

A Muslim is not bound under his personal law to maintain his illegitimate son by a Hindu concubine. [*Para.* 2.]

Since however, the illegitimate son is a 'Hindu' under section 2 (1) Explanation clause (*b*) of the Hindu Adoptions and Maintenance Act, by reason of his mother being a Hindu he can claim maintenance under section 20 (2) against his father. [*Para.* 2.]

* S. A. No. 819 of 1969. 9th *July*, 1973.

There is nothing in section 20 (2) to suggest that the son, legitimate or illegitimate, can claim maintenance only against a Hindu father or mother. Having regard to the various provisions of the Act and the changes effected, it could not be the intention of the Act to leave a Hindu minor child without the right to maintenance against a Mahomedan father. [*Para.* 2.]

Appeal against the decree of the City Civil Court, Madras in A.S. No. 145 of 1968 preferred against O.S. No. 920 of 1966.

A. Nagarajan, for Appellant.

K. G. Manickavasagam, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, C.J.—The subject-matter of the Second Appeal is a maintenance decree against the defendant-appellant obtained by his minor illegitimate son. The appellant is a Mohamedan and the mother of the respondent is a Hindu. A sum of Rs. 100 per month has been decreed as his maintenance. That the respondent was the child of the appellant and that the mother of the child was a Hindu and there was no marriage between the two, has now to be taken as final in view of the findings of the Courts below; The outstanding question on which the reference was made by Ismail, J. to a Division Bench is whether the respondent in the circumstances could maintain the suit for maintenance against the Appellant.

2. It is pressed upon us for the appellant that neither under the personal law of the relative parties, nor the provisions of the Hindu Adoptions and Maintenance Act of 1956, is the respondent entitled to maintenance against the appellant. The claim has to be sustained only with reference to the statutory provisions, if at all for, under the personal law of the appellant, there is no obligation on his part to maintain his illegitimate son by a Hindu concubine. By virtue of Clause (*b*) in the Explanation in section 2 (1) of the Hindu Adoptions and Maintenance Act, 1956, the respondent is and has to be considered as a Hindu, because one of his parents, in this case his mother, is a Hindu. The Act is therefore, applicable to the respondent minor. It is equally clear that it does not apply to the appellant who is a Mohamedan. But, sub-section (3) of section 2 is to the effect that the expression "Hindu" in any portion of the Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom the Act applies by virtue of the provisions contained in the section. Even this provision may not attract to the appellant the provisions of the Act. The claim of the respondent will therefore depend on his being a Hindu, and therefore the rights conferred on him by the provisions of the Act. Section 20 reads follows:

"(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation.—In this section "parent includes a childless step-mother".

The argument for the appellant is that sub-section (2) being related to sub-section (1), that is the assumption, cannot be regarded as conferring rights on the illegitimate child not within the ambit of sub-section (1). Under sub-section (1), the obligation is thrown on a Hindu to maintain his legitimate or illegitimate child. Sub-section (2) confers a right upon the legitimate or illegitimate child to claim maintenance from his or her father or mother, so long as the child is a minor. The obligation under sub-section (1) arises by reason of the status of the person, whether the child is legitimate or not and whether a Hindu or not. But, sub-section (2) looks at the matter from the point of view of the child itself,

and if the child is a Hindu, irrespective of whether the father or the mother is a Hindu it is entitled to claim maintenance against him or her. There are no words in sub-section (2) to suggest that a Hindu legitimate or illegitimate child can claim maintenance under sub-section (2) only against a Hindu father or mother. The object of the Act is to amend and codify the law relating to adoptions and maintenance among Hindus, and considering the various provisions it has made and the changes, it appears to us it could not be the intention of the Act that a Hindu minor child would be left without the right to maintenance against a Mohamedan father. There is no justification in the language of section 20 to construe it in such a way that the right conferred under sub-section (2) is to be merely a corrollary or a consequence of what is provided under sub-section (1) by way of an obligation. On that view, we sustain the decree the respondent has obtained.

3. It is said that subsequent to the passing of the decree by the trial Court, the appellant has met with bad days and he is not as affluent as he then was. Considering the circumstances we think that, the matter should go back to the trial Court for a determination of the quantum of future maintenance in the light of the facts to be established by evidence. While we confirm the decree for maintenance, the proceeding will stand remitted to the trial Court for fixation of the quantum of future maintenance. Until there is alteration in the quantum of maintenance, the maintenance will be paid according to the rate now obtaining. The second appeal is accordingly ordered. The parties will bear their own costs.

P.S.P. ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*T. Ramaprasada Rao, J.*

Hindustan Steel Ltd., 150-A/4, Mount Road, Madras-2 *Petitioner**

v.

The Joint Commercial Tax Officer, Mount Road III Division, Madras and others *Respondents.*

Central Sales Tax Act (LXXIV of 1956), *section* 9 (3), *Tamil Nadu General Sales Tax Act (I of* 1967), *section* 16—*Escaped assessment—Dealer in outside State—Branch office at Madras—Despatch of goods from outside State—Invoice prepared outside State—Clear intention of appropriotion of goods—Branch office at Madras acted only as post office—Goods handed by outside State.*

In cases arising under the Sale of Goods Act which has a very prominent part to play while deciding whether a particular transaction ought to suffer a tax and if it ought to, in whose hands, the intention of the parties has a prominent part to play. Decided cases cannot automatically be taken under all circumstances to lay down general propositions of law when the question involved is as to whether there was a sale of ascertained goods or unascertained goods. [*Para.* 4.]

The preparation of the invoice by itself is reflective of a clear unalterable intention on the part of the seller that he had not only accepted the contract and performed it but had appropriated the goods ordered towards that contract and it was pursuant to such a declared intention that the goods were being despatched or were despatched. [*Para.* 4.]

The goods moved from outside State pursuant to a contract and in the course of inter-state travel, such transactions were rightly assessed and taxed to central sales tax by States other than the State of Madras. The branch office at Madras was only acting as a post office for the collection of the price of the goods so obtained by the buyers in Madras pursuant to the contracts entered into

* W.P. Nos. 3550 to 3554 of 1969. *9th August*, 1973.

between then and the petitioner. The branch office at Madras had no more specific part to play and its activity here did not in any way reflect and touch upon the inter-state nature of the transactions in question or that the inter-state movement started from that State outside the State of Madras which by itself was enough for the assessing State to acquire jurisdiction under the Central Sales Tax Act to bring to tax such transactions. [*Para.* 6.]

Cases referred to:—

Cement Distributors v. *Deputy Commercial Tax Officer*, (1969) 23 S.T.C. 86; *Larsen and Toubro Limited* v. *Joint Commercial Tax Officer*, (1972) 30 S.T.C. 77.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated in the respective affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the assessment order dated 27th September, 1969 passed in CST No. 5207 of 1964-65 for the assessment year 1964-65, CST. No. 5207 for the assessment year 1967-68; CST No. 5207 for the assessment year 1968-69; C.S.T. No. 5207 for the assessment year 1965-66; and CST No. 5207 for the assessment year 1966-67 respectively on the file of the Joint Commercial Tax Officer, Mount Road III Division, Madras-2, the first respondent in all the petitions and to quash the same.

V.K. Thiruvenkatachari, for *M/s. King & Patridge*, for Petitioner.

K. Venkataswami, First Assistant Government Pleader.

K. Srinivasan, *K. C. Rajappa* and *V. Natarajan*, for Respondents.

The Court made the following

ORDER.—In this batch of writ petitions a common question of law arises. It is enough if the facts in one of these writ petitions are noticed. The petitioner is an undertaking and an existing Company under the Companies Act of 1956. Its registered office is at Ranchi, Bihar. It has steel plants at Bhilai, Madhya Pradesh, Rourkela in the State of Orissa and Durgapur in the State of West Bengal. It has a branch office at No. 150-A-/4 Mount Road, Madras-2. The Company is a registered dealer under the Central Sales Tax Act in Madras, Madhya Pradesh, Orissa and West Bengal. The petitioner deals in iron and steel sections, bars, sheets, pipes etc. manufactured at their various steel plants distributed over the States in our country. The Madras office gathers the contracts and the relevant particulars of requirements from various intra—State parties in this State and transmits them to the Head office at Calcutta for being dealt with by them according the exigencies such as availability of the material and other factors governing the supply. During the assessment years 1964-65 to 1968-69, the petitioner was subject to Central sales tax for all the inter-State transactions had by it with the purchasers in this State. Those assessments were completed, in so far as the years 1964-65, 1965-66 and 1966-67, 1967-68 were concerned. Regarding the assessment year 1968-69 the assessment process was on but not yet completed. In relation to the closed assessments for the four years as above, notices under section 16 of the Tamil Nadu General Sales Tax Act which is the processable section adaptable for purposes of bringing to tax escaped assessment under the Sales Tax Act were issued on the ground that there was an escapement of assessment of Central sales tax to the State of Tamil Nadu. The explanation offered by the petitioner to the said show-cause notice to re-open the closed assessments for the four years was not acceptable to the Revenue. Finally, by the challenged order dated 27th September, 1969 the Joint Commercial Tax Officer, Mount Road, Madras-III Division, Madras-2, called upon the petitioner to suffer Central sales tax for all the four years as above as also the current year which was in the channel of assessment on the ground that the turn-over involved ought to have been subjected to central sales tax at this end (Madras) and the fact that such transactions suffered a similar tax in the various States of despatch such as the State of Orissa, the State of West Bengal and State of Madhya Pradesh would be an irrelevant consideration, if the admitted inter-state transactions in question are assessable to tax by the State of Tamil Nadu. In the view that I intend taking, it is not necessary to go into the further details as regard the quantum of assessment; but suffice it to say that the

notices issued after re-opening of the assessment indicates that several lakhs of rupees have escaped assessment in the process. In the order of assessment which is challenged before me, the Assessing Authority has given succinctly the facts which it may not be necessary to notice at this stage. The course of dealings which the petitioner had through its Madras office may be summarised thus. The customers or buyers of the petitioner in the State of Tamil Nadu placed orders with the petitioner's principal office at Calcutta for their requirements of iron, steel, hardware etc. It is common ground that all such memos containing details of requirements ordinarily known as orders, were forwarded to the petitioner at Calcutta. On receipt of such orders, the Central Office of the petitioner instructs its various plants situate in various other States such as the State of Orissa, State of Madhya Pradesh and State of West Bengal to consign and despatch the goods so ordered to Madras. This implies that the petitioner accepted the orders at Calcutta, but was processing the implementation of such orders by approaching its various factories situate in various States. One other incidental but necessary particular which has to be noticed is that as and when the plants despatched the goods to Madras, the petitioner is made aware of the same and it in turn prepares the invoice in relation to such supplies made by their respective plants in different States and sends the relative railway receipts to its branch office at Madras for collection of the price equivalent of the supply. In some cases the railway receipts are drawn for 'self' and in others in favour of the respective buyers or for persons, who placed orders. The Madras office endorses such railway receipts drawn for 'self' in favour of the buyers in exchange for money or delivers the railway receipts which are directly in the name of the buyer to it, on receipt of the consideration therefor. According to the revenue the documents which are a symbol of property, are handled by the Madras branch. Further, the assessing officer would have it that the goods in the instant case should be deemed to be unascertained goods and having regard to section 3 (2) (*b*) of the Act read with section 4 (2) (*b*) thereto and on the basic hypothesis that the goods are unascertained goods he came to the conclusion that the situs of the assessment is Madras and that having been overlooked in the earlier four years when the assessments were concluded, there has been an escapement of tax, and such an escapement was brought to tax in the proceedings undertaken by the Revenue when it re-opened it as stated already. They were of the view that section 9 (1) of the Act was not applicable to the facts of the case as they were definite that it was not a sale of ascertained goods. On this basis, the impugned orders of assessments were made.

2. The petitioner has come up to this Court challenging the same on the ground that there is total absence of jurisdiction on the part of the assessing officer when he assumed that the goods in the instant case were unascertained goods and consequently was in error in not having invoked sections 3 (2) (*b*) and 4 (2) (*b*) of the Act. The Revenue's case, however, is equally emphatic that the circumstances of the transaction had to be looked into and the matter was adjudged. The intention of the parties was that the appropriation of the goods should take place only in the State of Madras notwithstanding the movement of the goods in the course of their inter-State sale from out of State—States.

3. The question therefore is very simple and resolves itself into the ascertaining of the fact whether in the course of inter-State trade, ascertained goods were despatched from out of State—States. It is no doubt common ground that the goods were despatched, pursuant to the specific orders placed for the purpose by the buyers in Madras, from States such as Madhya Pradesh, West Bengal and Orissa. All such States, who after noticing that the goods moved from their States and that there were contracts of sale which occasioned such movement brought to tax the turnover involved in such admitted inter-State transactions. They have been made parties to these writ petitions and they now appear by counsel before me. They support the contention of the petitioner that this is a case of sale of ascertained goods and that the levy of Central tax by the respective

out of State—States is in accordance with law.

4. The primary document which almost clinches the issue before me is the invoice which the petitioner issues on every occasion when it has information about the despatch of the goods by its plants. A form of invoice has been produced before me. This shows that there was an order which the buyer placed with it and that it was accepted by it on a particular date. The other particulars given in the invoice are the quality of the sections, the number of pieces it contains, its weight and ultimately its price per ton. In the ordinary course of mercantile transactions invoices are prepared on the basis of concluded contracts. An invoice is a mercantile document prepared by a seller after consensus is reached as between him and the buyer regarding the terms of the contract which obviously include the quality, quantity, and the price of the goods. The invoice, thus, understood is a piece of evidence to throw light upon the intention of the parties that what was being despatched by the various manufacturing units of the petitioner company are ascertained goods and not goods which are yet to be ascertained or made specific or identifiable. Unascertained goods are those over which there is no consensus *ad idem* between the seller and the buyer. A common incidence of unascertained goods is where goods are sent in lots or in waggons and if something more has to be done to them for the purposes of ultimate delivery to the buyer, in accordance with the terms of the contract. This perspective but reserved step which is an essential element in unascertained goods is absent in the case of sale of ascertained goods. No doubt ascertained goods is not defined under the Act: But we could gather the legal equivalent of it by the various explanations given to the expression by experts. They are always treated and understood as goods identified in accordance with the agreement between the parties after a time when the contract of sale is made. After all under the Sale of Goods Act various rules are set out in the nature of sections but they mainly enumerate rules of intentions, which intention has to be gathered and equally varies in accordance with the facts and circumstances of each case. I have already referred to the invoice in this case. The preparation of the invoice by itself is reflective of a clear unalterable intention on the part of the seller that he has not only accepted the contract and performed it but has appropriated the goods ordered for towards that contract and it was pursuant to such a declared intention that the goods were being despatched or were despatched. Such being the evidence in the instant case, I am unable to agree with the learned Counsel for the Revenue that even after the preparation of the invoice and in the light of the circumstances disclosed on record, it should still be held that the goods despatched at the instance of the petitioner and duly invoiced for by it retain the badge of unascertained goods. Strong reliance was placed upon *Cement Distributors* v. *Deputy Commercial Tax Officer*[1]. As I said that in cases arising under the Sale of Goods Act which has a very prominent part to play while deciding whether a particular transaction ought to suffer a tax and if it ought to, in whose hands, the intention of the parties has a prominent part to play. Therefore, decided cases cannot axiomatically be taken under all circumstances to lay down general propositions of law when the question involved is as to whether there was a sale of ascertained goods or unacertained goods. The proposition of law laid down in *Cement Distributors* v. *Deputy Commercial Tax Officer*[1], was based on the fact that there was a sale of unascertained goods. Hence, that ratio followed. But I am of the view that in the instant case the goods are ascertained goods and, therefore, the principle in *Cement Distributors* v. *Deputy Commercial Tax Officer*[1], does not apply.

5. On the other hand the rule in *Larsen and Toubro Limited* v. *Joint Commerical Tax Officer*[2], in the proper one to be applied, having regard to the facts and circumstances of this case. That was also a case where despatches were made from out of State—States in response to orders made by intra State dealers resulting in inter-State transactions. The State from

1. (1969) 23 S.T.C. 86.
2. (1972) 30 S.T.C. 77.

which the goods were despatched, having regard to the movement of the goods within the meaning of section 3 (*a*) of the Central Sales Tax Act rightly brought to tax those transactions under the provisions of the Central Sales Tax Act. Those assessments were circuitously challenged as is done in the instant case by the State of Madras stating that such inter-State transactions have to suffer Central sales tax in the hands of the assessing authorities at Madras. This was negatived by a division Bench of our Court. Ramanujam, J., delivering the judgment on behalf of the Bench, while upholding the theory that in the case of ascertained goods when such goods moved as a result of contract of sale from a State which is out of State, as regards the State of Madras, then it is that State which has jurisdiction to tax the transactions under the Central Sales Tax Act. This principle sequarely applies to the facts of this case.

6. I have no hesitation to find that the goods moved from outside State pursuant to a contract and in the course of the inter-State travel, such transactions were rightly assessed and taxed to Central sales tax by States other than the State of Madras. The branch office at Madras was only acting as a post-office for the collection of the price of the goods so obtained by the buyers in Madras pursuant to the contracts entered into between them and the petitioner. The branch office at Madras had no more specific part to play and its activity here does not in any way reflect and touch upon the inter-State nature of the transactions in question or that the inter-State movement started from that State outside the State of Madras which by itself is enough for the assessing State to acquire jurisdiction under the Central Sales Tax Act to bring to tax such transactions.

7. The impugned order, therefore, poses an error apparent and is also without jurisdiction. The rule *nisi* is made absolute. The writ petitions are allowed. There will be no order as to costs. I shall however, make it clear that in so far as the assessment year 1968-69 is concerned, excepting for that portion of the order which touches upon the subject-matter which is considered in this writ petition, the other portions of the said order are not in any way affected or set aside by reason of the disposal given in this writ petition.

S.J. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

V. A. Narayana Raja ... *Appellant**

v.

O. RM. M. SV. M. Meyyappa Chettiar (died) and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 90, *Order* 43, *Rule* 1 (jj)—*Mortgage decree—Sale by Court-auction—Mortgagor adjudicated insolvent—Application by insolvent to set aside sale—Maintainability—Applicant not present in Court—Whether Court can dismiss application—Dismissal order for default—Appealable.*

Though an insolvent does not have a present right of management over his properties till he is discharged from his insolvency or till the insolvency is annulled it can never be denied that the insolvent is entitled to any surplus proceeds or properties left unsold after the claims of his debtors are satisfied. As such an insolvent certainly has a right to agitate before the executing Court that his properties had not been sold for a just and proper price, even though he does not have a right *in presenti* over his properties and his right to claim the surplus proceeds is a latent right, which can be enforced only after all the claims of the debtors satisfied. [*Para.* 8.]

A reading of rule 1 (*jj*) of Order 43, Civil Procedure Code, clearly shows that what is required for an appeal being preferred against a rejection of an application under sub-rule (1) of rule 105 of Order 21 of the Code is that the order on the main application referred to in sub-rule (1) of rule 104 of Order 21, is an appealable order. Undoubtedly an order of dismissal of an application under Order 21, rule 90 of the Code, is an appealable order under Order 43, rule 1 (*jj*). Nowhere it is stated in Order 43,

* A.A. O. No. 307 of 1971.

19*th October*, 1973.

rule 1 (*jj*) that where an application under rule 105 had been dismissed for default, it was not open to the aggrieved party to file an appeal.

[*Para.* 13.]

Cases referred to :—

Subbaraya Chettiar v. *Panathiammal*, (1918) 7 L.W. 516; *Sogamal Chatrabanjee* v. *Tarachand Chatrabanjee*, (1948) 2 M.L.J. 105; *Narasimham* v. *Ramayya*, I.L.R. (1951) Mad. 77 at 102 : 63 L.W. 333 : (1950) 1 M.L.J. 484: A.I.R. 1950 Mad. 492; *Swaminatha Odayar* v. *Kalyanarama Aiyangar*, (1933) 65 M.L.J. 359: 38 L.W. 382: A.I.R. 1933 Mad. 694; *Subbaraya Goundan* v. *Virappa Chettiar Bank*, (1933) I.L.R. 57 Mad. 89: 65 M.L.J. 719: 38 L.W. 745 : A.I.R. 1933 Mad. 851 (F.B.); *Manthiri Goundan* v. *Arunachalam Goundar*, (1940) 51 L.W. 600; (1940) 1 M.L.J. 711: A.I.R. 1940 Mad. 569; *Ponnuswami* v. *Subbaraya*, 60 L.W. 49 (1) : (1947) 1M.L.J. 37: A.I.R. 1947Mad. 298; *Narayana* v. *Pappayi*, 26 L.W. 164: (1927) 53 M.L.J. 229: A.I.R. 1927 Mad. 783; *Rajaram* v. *Bhavanisankar*, (1938) 2 M.L.J. 940: A.I.R. 1939 Mad. 193; *Ayyappa* v. *Kasiperumal*, (1939) 1 M.L.J. 163 : 49 L.W. 110: A.I.R. 1939 Mad. 250 (F.B.); *T.S. Sailappan* v. *Subbiah Pillai*, (1962) 2 M.L.J. 493: 75 L.W. 713: I.L.R. (1963) Mad. 1 : A.I.R. 1963 Mad. 156 (F.B.); *Ismail Rowther* v. *Moyamoon Bibi*, (1965) 2 M.L.J. 197: 78 L.W. 498: I.L.R. (1966) 1 Mad. 313: A.I.R. 1966 Mad. 84; *Chellam Iyer* v. *Subramania Iyer*, (1932) M.W.N. 423: 36 L.W. 422: A.I.R. 1932 Mad. 414.

Appeal against the order of the Sub-Court Madurai in E.A. No. 716 of 1969 in E.A. No. 157 of 1969 in E.P. No. 110 of 1967 in O.S.No. 166 of 1965.

M. Srinivasan, for Appellant.

N.C. Raghavachari, S. Narayana Iyengar, K.S. Sundararama Iyer and *N.S. Varadachari*, for respondents.

The Court made the following

ORDER.—The petitioner in E.A. No. 716 of 1969 in E.A. 157 of 1969, in E.P.No. 119 of 1967 in O.S. No. 166 of 1965, on the file of the Court of the Subordinate Judge, Madurai, is the appellant. This appeal has come to be filed in the following circumstances.

2. The first respondent in the said petition filed the suit O.S. No. 166 of 1965, against the appellant for recovery of amounts due to him on a mortgage and obtained a preliminary decree and a final decree in his favour. The fourth respondent who was the second defendant in the suit, was a subsequent encumbrancer and on payment of necessary Court-fees by him, he was also given a decree for the amount due to him. Consequent on the death of the first respondent, the second and the third respondents, got themselves impleaded as legal representatives of the first respondent and brought the mortgaged items for sale in court-auction. Certain items of properties, which were the hypotheca, were brought to sale in Court-auction and the sale was held on 22nd January, 1968 and continued on 23rd January, 1968.

3. The appellant filed a petition before the learned Subordinate Judge, praying for an adjournment of the sale on 22nd January, 1968 on the ground that wide publicity has got to be given for the Court-auction sale. Since the appellant had been adjudicated insolvent prior to the hypotheca being brought to sale, the Official Receiver in whom the properties of the appellant had vested, also filed an application before the learned Subordinate Judge for adjournment of the sale on 22nd January, 1968. The learned Subordinate Judge did not deem it necessary to stop the sale on 22nd January, 1968, in compliance with the request of the appellant and the Official Receiver but instead directed the sale to continue on the next day also, *i.e.*, 23rd January, 1968.

4. On 22nd January, 1968, the 7th respondent, who is said to be a nephew of the 2nd respondent purchased item 1 of the property for Rs. 40,000. On the second day, *i.e.*, 23rd January, 1968, the 6th respondent said to be a partner of the 4th respondent purchased item 2 for Rs. 73,500.

5. It was, therefore, the appellant filed the petition E.A. No. 157 of 1969 under Order 21, rule 90, Civil Procedure Code, praying that the sales of items 1 and 2 of the properties held on 22nd January, 1968 and 23rd January, 1968 be set aside. The contention of the appellant in the said petition was that due and proper publicity had not been given for the

sale, and that the respondents misled some of the intending competitors by representing to them that no sale would take place, that they scared away some of the other competitors by false representations, that it was on account of such mal-practices the properties had been sold for low prices, that item 1 was easily worth Rs.80,000, that item 2 was likewise worth Rs. 1,50,000, that the respondents had acted fraudulently in order to knock off the properties for low prices and that therefore the sale of items 1 and 2 of the hypotheca should be set aside. The Official Receiver also filed an affidavit in support of the contentions of the appellant and prayed for the sale of items 1 and 2 of the hypotheca being set aside.

6. This petition E.A.No.157 of 1969 was posted for hearing on 28th July, 1969. On that date, the Counsel for the appellant moved for an adjournment on the ground that the appellant, who had proceeded to Madras, had taken ill at Madras, that the appellant had sent a medical certificate dated 25th July, 1969 from Madras that the appellant had also sent a telegram on 27th July, 1969 and that, therefore, the enquiry of the petition may be adjourned to some other date. The learned Subordinate Judge refused to grant adjournment, and thereupon the appellant's Counsel reported no instructions. Consequently, the learned Subordinate Judge dismissed the application E.A. No. 157 of 1969 for default.

7. Coming to know about the dismissal of the petition, the appellant filed E.A. No. 716 of 1969 under Order 21, rule 105, Civil Procedure Code, praying that E.A. No. 157 of 1969 which had been dismissed for default, may be restored. Notice was ordered to the respondents in E.A. No. 716 of 1969 for hearing on 12th September, 1969. Accordingly, the appellant took notice to the respondents on 12th September, 1969. The appellant's Counsel was present in Court, but the appellant himself was not present in Court on 12th September, 1969. In those circumstances, the learned Subordinate Judge passed the following order:

"Petitioner absent. Opposed by the respondents. Petition dismissed".

It is to canvass the correctness of this order the appellant has preferred the present appeal.

8. Before Mr. M. Srinivasan, the learned Counsel for the appellant, could advance arguments on the appeal on merits, Mr. N.C. Raghavachari, the learned Counsel for respondents 1 and 2 in the appeal (legal representatives of the deceased O.RM.S.C.M. Meyyappa Chettiar) and Mr. S. Narayana Iyengar, learned Counsel for the 5th respondent, raised two preliminary objections about the maintainability of the appeal. It was firstly, contended by them that inasmuch as the appellant had been adjudicated insolvent and his properties had vested with the Official Receiver, it was not open to the appellant to have filed E.A. No. 157 of 1969 under Order 21, rule 90, Civil Procedure Code. The second objection that was raised was that as against the dismissal of E.A. No. 716 of 1969 for default no remedy by way of appeal was available to the appellant. In support of the first objection raised by the Counsel for the respondents, reliance was placed on two decisions of this Court. In *Subbaraya Chettiar* v. *Panathiammal*[1], it has been held by this Court that an undischarged insolvent had no right to sue for the recovery of property, which was vested in the Official Receiver and that the Official Receiver was the only person competent to sue for enforcing the right to property possessed by an insolvent In *Sogmal Chatrabanjee* v. *Tharachand Chatrabanjee*[2], it was held by this Court that where a coparcener, during the pendency of a suit to set aside a family partition and to re-partition the property, became an insolvent and the Official Receiver had been added as a supplementary plaintiff and the suit resulted in a dismissal, it was only the Official Receiver, who had a right of appeal and that when the Official Receiver refused to file an appeal, it was not open to the insolvent to file an appeal against the dismissal of the suit. In my opinion, both these authorities have no application to the facts on hand. In both the cases, the dispute was either regarding the insolvent's right to sue for or to be in management of his property. When

1. (1918) 7 L.W. 516.
2. (1948) 2 M.L.J. 105.

the properties had admittedly vested in the Official Receiver on account of the insolvency proceedings, it was only the Official Receiver, who was entitled to institute a suit or appeal in respect of matters relating to the management of the insolvent's property. On the other hand, what we are now concerned is with the right of an insolvent to have a sale of his properties set aside on the ground of material irregularity or fraud in the sale of his properties in Court-auction. The two categories of cases are entirely different in their scope and objective. Though the insolvent does not have a present right of management over his properties till he is discharged from his insolvency or till the insolvency is annulled it can never be denied that the insolvent is entitled to any surplus proceeds of properties left unsold after the claims of his debtors are satisfied. As such, an insolvent certainly has a right to agitate before the executing Court that his properties had not been sold for a just and proper price, even though he does not have a right *in praesenti* over his properties and his right to claim the surplus proceeds is a latent right, which can be enforced only after all the claims of the debtors are satisfied.

9. It is now well-settled that the words "whose interests are affected by the sale", occurring in Order 21, rule 90, Civil Procedure Code, have a wide connotation and significance and that the application of those words cannot be restricted to persons, who have a direct and immediate right in the property sold in Court-auction. This Court has repeatedly held that judgment-debtors, who have been adjudged insolvents are also persons, whose interests are affected by a sale of their properties in Court-auction. A Full Bench of this Court has observed in *Narasimham* v. *Ramayya*[1], that the settled law of this Court so far as this aspect of the matter is concerned is as follows:

> "Judgment-debtors who had been adjudged insolvents have been recognised by this Court as having a right to apply to set aside execution-sales of properties which once belonged to them, though vested in the Official Receiver on their adjudication. They have been treated as persons whose interests are affected by the Court-sales and allowed to apply under Order 21, rule 90, Civil Procedure Code, to set aside such sales and to appeal from adverse orders passed on their applications; see *Swaminatha Odayar* v. *Kalyanarama Aiyangar*[1], *Subbaraya Goundan* v. *Virappa Chettiar Bank*[2], and *Manthiri Goundan* v. *Arunachalam Goundar*[3]."

In *Ponnuswami* v. *Subbaraya*[4], a Bench of this Court, following the earlier decisions, has held that a judgment-debtor, who was adjudicated an insolvent was a person interested in the property sold within the ordinary meaning of that expression in Order 21, rule 90, Civil Procedue Code, that an application by him to set aside the sale was maintainable and that the amendment of Order 21, rule 22 in Madras, requiring notice to issue to the Official Receiver instead of to the insolvent cannot affect the question whether the insolvent was a person interested within the meaning of Order 21, rule 90, Civil Procedure Code. The learned Counsel for the respondents sought to distinguish the facts in the Full Bench decision in *Subbaraya Goundan* v. *Virappa Chettiar Bank*[2] on the ground that in that case the judgment-debtor was adjudicated insolvent subsequent to the Court-auction sale whereas in the instant case the appellant was adjudicated an insolvent even before the hypotheca was sold in Court-auction. In my opinion, this distinction cannot have any significance. Though the decision in *Subbaraya Goundar* v. *Virappa Chettiar Bank*[2], proceeds on the footing that since the insolvency petition was filed after the properties were sold in Court-auction, the properties will not vest in the Official Receiver till the sale was set aside and that the Official Receiver cannot even claim the benefit of the execution, inasmuch as the assets had been realised

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1. I.L.R. (1951) Mad. 77 at 102 : 63 L.W. 333 : (1950) 1 M.L.J. 484 : A.I.R. 1950 Mad. 492 (F.B.).

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1. (1933) 65 M.L.J. 359 : 38 L.W. 382 : A.I.R. 1933 Mad. 694.
2. (1932) I.L.R. 57 Mad. 89 : 65 M.L.J. 719 : 38 L.W. 745 : A.I.R. 1933 Mad. 851. (F.B.).
3. (1940) 51 L.W. 600 : (1940) 1 M.L.J. 711 : A.I.R. 1940 Mad. 569 (D.B.).
4. (1947) 1 M.L.J. 537 : 60 L.W. 49 (1) : A.I.R. 1947 Mad. 298 (D.B.).

before the date of the admission of the insolvency petition, the Full-Bench has categorically stated that the insolvency of a judgment-debtor did not *per se* render it incompetent for him to continue a petition filed by him earlier under Order 21, rule 90, Civil Procedure Code. It is worthwhile mentioning here that none of the other decisions referred to above had made any distinction regarding the right of an insolvent to file an application under Order 21, rule 90, Civil Procedure Code, irrespective of the fact whether his adjudication was prior to or subsequent to the sale of the property.

10. I may only refer to a few other authorities which point out that the words "whose interests are affected by the sale" have a wide connotation and significance. A purchaser of one item of the mortgaged property can apply under Order 21, rule 90, Civil Procedure Code, to have the sale of the other items of the mortgaged property set aside, as he is a person "whose interests are affected by the sale". (Vide *Narayana* v. *Pappayi*[1], A person, who has obtained an attachment before judgment, though not a secured creditor in the ordinary sense, is a person, who has some interest in the property, and is, therefore, within Order 21, rule 90, and can apply under it. (Vide *Rajaram* v. *Bhavanisankar*[2], and *Ayyappa* v. *Kasiperumal*[3]). An interim receiver appointed under section 20 of the Provincial Insolvency Act whether appointed subsequent to or before in an execution sale can be clothed by the insolvency Court with authority to take proceedings under Order 21, rule 90, Civil Procedure Code, to set aside the sale; *T.S. Sailappan* v. *Subbiah Pillai*[4]. A rival decree-holder, who had purchased some items of the property of the judgment-debtor, and which items were also attached by another decree-holder in execution is a person whose interests are affected by the sale, and as such entitled to file an application under Order 21, rule 90, Civil Procedure Code, *Ismail Rowther* v. *Maymoon Bibi*[1].

11. In view of the preponderance of the judicial decisions in this behalf, it is not open to the respondents to contend that by reason of the insolvency of the appellant, he is not entitled to file an application under Order 21, rule 90, Civil Procedure Code, and that, therefore, he is not entitled to file the application E.A. No. 716 of 1969 for the restoration of the application E.A.No. 157 of 1969, which was dismissed for default.

12. With regard to the second objection of the learned Counsel for the respondents, the argument is that no date need be fixed for hearing in respect of an application under Order 21, rule 105, Civil Procedure Code, that it is only under Order 21, rule 104, Civil Procedure Code that the date should be fixed in respect of applications under any of the rules foregoing rule 104, that as such, the appellant had no right to be absent from Court on 12th September, 1969, that therefore, the appellant is not entitled to question the dismissal of E.A. No. 716 of 1969 for default and that consequently, the appeal preferred against the dismissal of that petition is not maintainable.

13. In my view, this contention is also an unsustainable one. It is no doubt true that sub-clause (1) of rule 104 of Order 21, Civil Procedure Code makes provision for a Court before which an application under any of the rules foregoing rule 104 has been filed, to fix a date for the hearing of the application and that no such provision is made in respect of an application under rule 105 of Order 21, Civil Procedure Code. That cannot however, be taken to mean that in respect of an application under Order 21, rule 105, Civil Procedure Code it was incumbent upon the applicant to be personally present on each and every day to which the application stood posted and that his non-appearance in Court on any day in which the petition was called should necessarily result in the dismissal of his application and that an aggrieved applicant cannot canvass the correctness of that order in

1. (1927) 53 M.L.J. 229 : 26 L.W. 164: A.I.R. 1927 Mad. 783.
2. (1938) 2 M.L.J. 940 : A.I.R. 1939 Mad. 193.
3. (1939) 1 M.L.J. 163: 49 L.W. 110 : I.L.R. (1939) Mad. 374 : A.I.R. 1939 Mad. 250 (F.B.)
4. (1962) 2 M.L.J. 493 : 75 L.W. 713 : I.L.R. (1963) Mad. 1: A.I.R. 1963 Mad. 156 (F.B.).

1. (1965) 2 M.L.J. 197 : 78 L.W. 498 : I.L.R. (1966) 1 Mad. 313 : A.I.R. 1966 Mad. 84.

appeal. Order 43, rule 1 (*jj*), Civil Procedure Code, is to the following effect:

> "1. An appeal shall lie from the following orders under the provisions of section 104, namely—
>
> (*jj*) an order rejecting an application made under sub-rule (1) of rule 105 of Order 21 provided an order on the main application referred to in sub-rule (1) of rule 104 of that order is appealable:"

A reading of this provision clearly shows that what is required for an appeal being preferred against a rejection of an application under sub-rule 1 of rule 105 of Order 21, Civil Procedure Code, is that the main application referred to in sub-rule 1 of rule 104 of Order 21, Civil Procedure Code, is an appealable order. Undoubtedly an order of dismissal of an application under Order 21, rule 90, Civil Procedure Code, is an appealable order under Order 43, rule 1 (*j*). Therefore, the appellant is certainly entitled to file an appeal as against the dismissal of E.A. No. 716 of 1969, which was filed under Order 21, rule 105, Civil Procedure Code. Nowhere is it stated in Order 43, rule 1 (*jj*) that where an application under rule 105 had been dismissed for default, it was not open to the aggrieved party to file an appeal. In such circumstances, the second objection raised by the learned Counsel for the respondents is also clearly untenable.

14. Coming now to the merits of the case of the appellant, it is contended by Mr. Srinivasan, learned Counsel for the appellant, that the appellant's absence from Court on 12th September, 1969 was not wanton, that the appellant was laid up with an ailment at Madras, that in proof of such ailment the appellant had sent a medical certificate and that further more the applicant's Counsel was present in Court on that date and sought for an adjournment of the hearing and that it was only after the request for adjournment was refused that the Counsel reported no instructions. Mr. Srinivasan also placed reliance upon the fact that the application stood posted to 12th September, 1969 only for service of notice on the respondents and not for final hearing or disposal. His argument, therefore, was that on 12th September, 1969 the learned Subordinate Judge should have only called upon the respondents to file their counter and ought not to have dismissed E.A. No. 716 of 1969 merely on the basis of the oral objections raised by the respondents and the absence of the appellant. Yet another argument of Mr. Srinivasan was that when the appellant had been specifically directed by the Court to be present on 12th September, 1969 the presence of the appellant's Counsel in Court must be deemed to be the presence of the appellant himself and that, therefore, the learned Subordinate Judge was not justified in holding that the appellant was absent from Court. In support of this last contention of his, Mr. Srinivasan placed reliance upon the following decision, *Viswanatha Asari* v. *Sami Asari*[1], where it was held that when at the time of hearing of the suit, the plaintiff was not absent, but was represented by a pleader, who asked for an adjournment, which was refused, the suit should not have been dismissed for default under Order 17, rule 2, Civil Procedure Code but on the other hand a judgment must have been written and the case disposed of under Order 17, rule 3, Civil Procedure Code. In *Chellam Iyer* v. *Subramania Iyer*[2], it has been held that in ordinary circumstances if a party is represented by a pleader, that was an appearance for the purpose of Order 9, rule 17, Civil Procedure Code. There is considerable force in the argument of Mr. Srinivasan, that there was no specific direction by Court for the appellant to be present in Court on 12th September, 1969, and that as such the appellant's failure to be present in Court on that date ought not to have been construed by the Court as fatal to the maintainability of his application under Order 21, rule 105, Civil Procedure Code, In as much as the application had been posted on 12th September, 1969, only for service of notice of the application to the respondents, it is quite likely that the appellant was misled into thinking that his presence in Court was not absolutely necessary; moreover it is seen that the appellant had sent a medical certificate and also a telegram to his Counsel explaining the reason for his inability to be

1. 18 L.W. 219 : A.I.R. 1924 Mad. 43.
2. (1932) M.W.N. 423 : 36 L.W. 422 : A.I.R. 1932 Mad. 414.

present in Court on 12th September, 1969 and had specifically requested his Counsel to move the Court for an adjournment. In such circumstances, the dismissal of the application E.A.No. 716 of 1969 for default is clearly not in accordance with law. Therefore, the order of the learned Subordinate Judge is set aside and the appeal is allowed. The learned Subordinate Judge will dispose of E.A. No. 716 of 1969 on merits after calling for the objections of the respondents to the application filed by the appellant under Order 21, rule 105, Civil Procedure Code. None of the observations made herein need be taken into consideration by the Court in disposing of E.A. No.716 of 1969 on merits. There will be no order as to costs.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao* and *S. Natarajan, JJ.*

State of Madras, represented by the Collector of Kanyakumari at Nagarcoil .. *Appellant**

v.

Charles Harold Simpson .. *Respondent.*

Civil Procedure Code (V of 1908), *sections* 21, 10—*Judgment—Defect regarding pecuniary jurisdiction of Court—Objection technical—Scope on appeal—Judgment not a nullity*—Res judicata.

Any objection as to lack of jurisdiction both territorial and pecuniary is a technical one and the decision rendered is not open to consideration by an appellate Court, unless there has been prejudice on the merits. [*Para.* 10.]

Kiran Singh v. *Gaman Paswarn,* 1954 S.C.J. 514: (1954) 2 M.L.J. 60: A.I.R. 1954 S.C. 340, followed.

Any defect regarding the pecuniary jurisdiction of the Court is not so vital as to go to the very root of the subject-matter of the litigation rendering the ultimate judgment given a nullity. [*Para.* 10.]

A decision of the High Court which has become unchallengable in the sense that a further attempt by one of the parties to test its correctness in the Supreme Court was also unsuccessful binds that party and precludes it from reopening the question on the same or on similar ground. [*Para.* 10.]

Cases referred to :

State of Madras v. *Simpson,* (1965) I.L.R. 2 Mad. 563; *State of Madras* v. *Charles Harold Simpson,* (1967) 2 M.L.J. 302: (1967) 80 L.W. 44 (D.B.); *Kiran Singh* v. *Ghaman Paswan,* 1954 S.C.J. 514: (1955) 1 S.C.R. 117: (1954) 2 M.L.J. 60: A.I.R. 1954 S.C. 340; *Hiralal* v. *Kalinath,* (1961) 2 S.C.J. 592: (1961) 2 M.L.J. (S.C.) 157: (1961) 2 An.W.R. (S.C.) 157: (1962) 2 S.C.R. 747: A.I.R. 1962 S.C. 199.

Appeal against the decree of the District Court, Kanyakumari at Nagarcoil in O.S.No. 4 of 1964.

The Additional Government Pleader, for Appellant.

S. Chellaswamy, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The plaintiff, State of Madras represented by the Collector of Kanyakumari, in O.S. No. 4 of 1964 on the file of the Court of the District Judge, Kanyakumari, is the appellant herein. The suit property originally belonged to one Kendiran Konikkaran whose heirs conveyed the same to the respondent-defendant's grand-mother by a sale deed of the year 1050 M.E. (1874 A.D.) and the respondent had succeeded to the suit property as heir to his grand-mother. Originally, the respondent instituted a suit in the District Court, Nagarcoil, which was numbered as O.S. No. 51 of 1957 on the file of the Sub-Court, Nagarcoil praying for a declaration of his title to the suit property and for a permanent injunction restraining the State of Madras, the appellant herein, from interfering with his possession thereof. The District Court of Kanyakumari which included the Sub-Court at Nagarcoil was within the quondam State of Travancore-Cochin. He filed the suit as aforesaid by valuing the relief at Rs. 1,000, asking for substantial reliefs as above stated, which was in

* A.No. 21 of 1970.

10th December, 1973.

accordance with the provisions of law as it existed in the State of Travancore-Cochin. But by Act XXII of 1957, the provisions of the Civil Procedure Code, the Suits Valuation Act and the Court-fees Act were extended to that State, with the result, the above O.S.No. 51 of 1957 on the file of the Sub-Court, Nagarcoil was transferred to the District Munsif's Court, Nagarcoil and numbered as O.S No. 88 of 1958. This suit after trial was decreed. The State went on appeal. On a check-slip issued by the office, the appeal memo. was returned for a proper valuation in accordance with the provisions of the Suits Valuation Act and for the payment of the proper Court-fee. The Government Pleader represented that as per the position of law which prevailed at the time when the original suit was instituted, the proper Court-fee was paid and the suit was laid in the proper forum. On such representation, the appeal was entertained and numbered originally as No. 64 of 1960 and later transferred to the Sub-Court, Nagarcoil and numbered as A.S.No. 86 of 1961. The learned Subordinate Judge of Nagarcoil allowed the appeal. The respondent herein came up in second appeal to this Court (S.A. No. 438 of 1961). After hearing the parties, this Court set aside the judgment of the Subordinate Judge and remanded the case for further trial. This eventually resulted in A.S. No. 86 of 1961 being dismissed. The result was that the respondent succeeded till that stage and obtained the declaration sought for by him when he approached the District Munsif's Court, Nagarcoil. The State, thus confronted with the decision of the Subordinate Judge of Nagarcoil, filed S.A.No. 856 of 1963 and mainly questioned that the transfer of the suit by the Sub-Court, Nagarcoil to the District Munsif's Court, Nagarcoil, as referred to already, was improper. We are not however concerned with the other allegations on which the State based its appeal. Finally a Division Bench of this Court by a judgment reported in *State of Madras* v. *Simpson*[1], came to the conclusion that the question of valuation and the Court-fee paid on the *lis* became *res judicata* and was not open to review and ultimately on merits set aside the judgment of the learned Subordinate Judge and once again remanded the matter for hearing by the appellate Court. This time, the appeal was heard again and the Sub-Court, Nagarcoil dismissed the appeal of the State. In the ultimate analysis the plaintiff succeeded in obtaining a declaration as to his title and also an injunction as against the State restraining it from interfering with his possession. The State once again appealed by way of S.A. No. 266 of 1966. This time also the State was unsuccessful. By a judgment reported in *State of Madras* v. *Charles Harold Simpson*[1], this Court confirmed the judgment of the learned Subordinate Judge and dismissed the State appeal as above. It is also represented before us that on the refusal of leave to appeal to the Supreme Court, a Special Leave was sought for by the State in the Supreme Court, but unsuccessfully.

2. To make the narration complete, whilst the S.A. No. 856 of 1963 was pending in this Court, the State filed an independent action in O.S. No. 4 of 1964 on the file of the District Court, Nagarcoil and prayed for a declaration that the State is entitled to the suit properties and for an injunction restraining the respondent from interfering with the possession and enjoyment of the *suit* properties in pursuance of the decree in O.S. No. 88 of 1958 on the file of the District Munsif Court, Nagarcoil. We have already traced the history of O.S. No. 88 of 1958 from the beginning to the end.

3. When this case came up for trial, one of the parties to the suit (it is represented at the Bar that it was the State of Madras) sought for a stay of the trial of the suit under section 10, Civil Procedure Code, as by then the High Court was in seisin of the matter which arose from the judgment of the Subordinate Judge emanating from O.S. No. 88 of 1958 on the file of the District Munsif Court, Nagarcoil. O.S. No. 4 of 1964 on the file of the District Court, Nagarcoil was thus stayed. After the disposal of S.A. No. 266 of 1966, by this Court, the trial of O.S. No. 4 of 1966 was taken up. Curiously enough the same grounds were tread by the State and rightly the learned District Judge discountenanced all the contentions on

1. I.L.R. (1965) 2 Mad. 563.

1. (1967) 2 M.L.J. 302: (1967) 80 L.W. 44 (D.B.).

merits and even the question of law that the resultant decision in O.S.No. 88 of 1958 which had the blessings of the High Court and even the Supreme Court would not bind the State. The learned District Judge after trial dismissed the suit of the State and it is as against this, the present appeal has been filed.

4. Mr. G. Ramaswami, learned Counsel for the appellant-State, would give the reason as to why the occasion arose for the State to file an independent suit, O.S. No. 4 of 1964. One Ramanathan Pillai filed O.S. No. 51 of 1963 on the file of the Sub-Court, Nagarcoil, praying for a declaration that a certain property was absolutely his and sought for a declaration of title and necessary consequential reliefs. It appears that a portion of the present suit property was included in the property claimed by Mr. Ramanathan Pillai. As a matter of fact, the State as well as the respondent were parties to that litigation. Ultimately it was declared that no portion of the property claimed by Ramanathan Pillai did form part of the present suit property. But the impression gained that a portion of the suit property in this litigation was also claimed by Ramanathan Pillai, was responsible for the independent suit filed by the State in O.S.No. 4 of 1964 on the file of the District Court, Nagarcoil.

5. Before the learned District Judge and even before us it was contended that the valuation of the suit property as was done by the respondent before the District Munsif Court, Nagarcoil, in O.S. No. 88 of 1958, being obviously an attempt to avoid the provision of law, the earlier litigation and the resultant decisions rendered by this Court would not bind the State. In this respect, the appellant sought for a reopening of the entire decision which has become practically final. But the learned District Judge both on merits and on the specific question of law raised as above would not agree with the contention raised on behalf of the State. As a matter of fact, no evidence other than the evidence that formed part of the suit O.S.No. 88 of 1958 was adduced except for the reiteration of the legal contentions which have been finally decided in the eye of law. In view of the earlier litigation, no further argument was urged before the trial Court. It was in those circumstances, the trial Court would not agree with the contentions of the State and dismissed the suit.

6. Mr. G. Ramaswami raised similar contentions before us, but in all fairness, he did not traverse through the entire grounds on merit. He however, hesitantly contended that if a deliberate undervaluation of the property is made in a suit and by mistake or otherwise the Court decides the matter, then such a decision cannot be said to be one which is valid, but on the other hand, his contention is that it is a nullity for all purposes. Ultimately, he would put it that the judgment so rendered is without jurisdiction.

7. We would have been inclined to hear this contention once over but for the fact that in *State of Madras* v. *Simpson*[1], a Bench of this Court practically covered the point and held that the valuation adopted by the respondent for the purposes of Court-fee and jurisdiction was correct. They also put it on the ground of estoppel. The learned Judge would hold thus:

> "But in the instant case, the State of its own choice not only filed the appeal in the District and in the High Courts, but at the same time adopted and accepted the plaintiff's valuation of the subject-matter in dispute. Hence the State would be precluded from raising the present objection as to jurisdiction."

8. On the other question raised as to whether the judgment so rendered by this Court is a nullity, since a Court which ordinarily would not entertain a suit because of its valuation did entertain it, went into it and rendered a decision thereon, this position is now covered by two decisions of the Supreme Court.

9. In *Kiran Singh* v. *Ghaman Paswan*,[2] Venkatarama Iyer, J., speaking for the Bench observed as follows:

> "With reference to objections relating to territorial jurisdiction, section 21, Civil Procedure Code, enacts that no objection to the place of suing should be allowed by an appellate or revisional Court, unless there was a consequent failure of justice. It is the same principle that has been adopted in section 11 of the Suits Valuation Act with refer-

1. (1965) I.L.R. 2 Mad. 563.
2. (1954) 2 M.L.J. 60: 1954 S.C.J. 514: (1955) 1 S.C.R. 170: A.I.R. 1954 S.C. 340.

ence to pecuniary jurisdiction. The policy underlying sections 21 and 99, Civil Procedure Code and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purelyon technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits".

10. Even so, in *Hiralal* v. *Kalinath*[1], the Supreme Court observed that it is well-settled that the objection as to local jurisdiction of a Court does not stand on the same footing as an objection to the competence of a Court in a case and goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. It also observed that on the other hand an objection as to the local jurisdiction of a Court can be waived and the principle has been given a statutory recognition by enactments like section 21, Civil Procedure Code. The Court further observed that the validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it. It cannot be said in the instant case that there is such an inherent lack of jurisdiction. As pointed out by the highest Court of the land, any objection as to lack of jurisdiction both territorial and pecuniary is a technical one and the decision rendered is not open to consideration by an appellate Court, unless there has been a prejudice on the merits. In this case, the decision of this Court in *State of Madras* v. *Simpson*[1], makes it clear that the State adopted the valuation of the respondent at all material times and therefore they have waived all technical objection. It therefore follows that any defect regarding the pecuniary jurisdiction of the Court is not so vital which goes to the very root of the subject-matter of the litigation so as to render the ultimate judgment given by it equatable to a nullity. Even otherwise, the ultimate view taken by this Court in (*State of Madras by Collector of Kanyakumari* v. *Charles Harold Simpson*)[1], is yet again a decision given by this Court on the basis of the valuation given by the respondent in the District Munsifs Court, Nagarcoil when it was in the State of Travancore-Cochin. This decision of this Court which has become unchallengeable in the sense that a further attempt by the State to test its correctness in the Supreme Court was also unsuccessful binds the State and precludes it from reopening the question on the very same or on similar grounds. We are therefore unable to agree with the learned Government Pleader that the decision rendered in the earlier series of litigations emanating from O.S. No. 88 of 1958 on the file of the District Munsif's Court, Nagarcoil has no significance at all in the eye of law. On the other hand, it binds the State to the extent that it is not open to it in this appeal before us to attempt to reopen the question and contend that if the suit property is not valued in accordance with the principles laid down in the Suits Valuation Act, then the District Munsif ought not to have tried the suit without the party paying requisite Court-fee as required by the then law governing the situation. It is also apposite to note that it was the State which filed an application for stay of trial of the suit O.S. No. 4 of 1964 from which this appeal arises and this also is a pointer that even at that stage the State was not inclined to disturb the already set state of affairs particularly in the matter of evaluation of the suit property and the payment of Court-fee. No other argument is addressed before us on the merits. In fact, we would not have allowed it on

1. (1961) 2 S.C.J. 592 : (1961) 2 M.L.J. (S.C.) 157 : (1961) 2 An.W.R. (S.C.) 157 : (1962) 2 S.C.R. 747 : A.I.R. 1962 S.C. 199.

1. (1965) I.L.R. 2 Mad. 563.
2. (1967) 80 L.W. 44 (D.B.) : (1967) 2 M.L.J. 302.

the ground that the decisions on the other issues have become *res judicata.*

11. In the result, the appeal fails and the same is dismissed. But having regard to the fact that there was some cause for the State to file the suit O.S. No. 4 of 1964 on the file of the District Court, Nagarcoil because of the provocation given by Ramanathan Pillai and as they were awaiting the decision in S.A.No. 266 of 1966, we do not think that the respondent should be awarded costs of this appeal. There will be no order as to costs in this appeal.

S. J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam and N. S. Ramaswami, JJ.*

A. Malayalam Pillai and another .. *Appellants**

v.

Malayammal and others. .. *Respondents.*

Hindu Law — Will—Endowment of properties for samadhi *and* matam*—Construction—Validity — Provisions if severable — Residuary clause providing for properties not covered by dispositions —Scope.*

By his will, a Hindu provided *inter alia* that P, M and T shall take and manage the E schedule properties and from their income shall inter his body after his death on a specified plot "pertaining to the aforesaid schedule, building structure therefor and put up light every day, shall plant flower plants in the said land and grow them, shall construct a *matam* for annual ceremonies, install pictures therein, put up light in the *matam* every day, conduct Guru Pooja once every year and at the time of the Guru Pooja distribute saffron-coloured cloths to those that wear saffron-coloured cloths and on that day shall feed the poor." A residuary clause recited that " the movable and immovable properties belonging to me and not mentioned herein shall be taken and enjoyed by the aforesaid three persons after my death."

* L.P.A. No. 6 of 1965. 31st January, 1973.

On a construction of these clauses,

Held: The entire bequest is invalid because it is only an endowment to the tomb of the testator and the *matam* is only an adjunct to the tomb and cannot be considered as a separate entity dissociated from the tomb. [*Paras.* 9 *and* 14.]

On a reading of the entire provision wherein the testator directed that a *samadhi* should be built and a *matam* also should be built, that the *samadhi* should be lighted every day and further that there should be Guru Pooja, it is quite clear that the dedication is for the tomb and purposes connected with it. The *matam* and the performances therein are not separate from the *samadhi* itself. [*Para.* 13.]

The words in the residuary clause "the movable and immovable properties belonging to me and not mentioned herein" should be construed as taking in properties not disposed of by the other clauses of the will, and as the endowment of the E schedule properties had failed, such properties also would be governed by the residuary clause and there would be no intestacy in regard to them. [*Para.* 15.]

Cases referred to:—

Subramania v. *Draviyasundram*, A.I.R. 1950 P.C. 37 ; *Saraswathi* v. *Rajagopala Ammal*, (1953) 2 M.L.J. (S.C.) 803 : 1953 S.C.J. 714 : 1954 S.C.R. 277 : A.I.R. 1953 S.C. 491.

Appeal under Clause 15 of the Letters Patent against the decree of the Honourable Mr. Justice Veeraswami, dated 15th January, 1964 and passed in S.A. No. 548 of 1961 preferred against the decree of the District Court, Tiruchirapalli, dated 31st August, 1960 and passed in A. S. No. 100 of 1958 preferred against the decree of the Court of the Subordinate Judge, Tiruchirapalli and passed in O.S. No. 109 of 1955.

B. V. Viswanatha Ayyar, for Appellants.

V. Ratnam, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—This Letters Patent Appeal is against the judgment

of Veeraswami, J., (as he then was) in Second Appeal No. 548 of 1961. The appellants are the plaintiffs in O.S. No. 109 of 1955 on the file of the Court of the Subordinate Judge, Tiruchirapalli. The two plaintiffs in the suit are one Malayalam Pillai and one Thangavelu Pillai while the sole defendant is one Ponnusami Pillai. All the three of them *viz.*, the two plaintiffs and the sole defendant, are the sons of one Appavu Pillai. The dispute relates to properties originally owned by one Karuppanna Pillai who is the paternal uncle of the abovesaid Appavu Pillai. Appavu Pillai's father Marudanayakam Pillai is still alive and this Marudanayakam Pillai is the brother of Karuppanna Pillai, the original owner of the suit properties. Karuppanna Pillai had no issue. It is common ground that Appavu Pillai, the father of the plaintiffs and the defendant, was the foster-son of Karuppanna Pillai, the testator. The said Karuppanna Pillai, died in the year 1947 leaving his last will and testament Exhibit B-1 dated 3rd March, 1942. He has dealt with his properties in five schedules in that will, described as A, B, C, D and E schedules. We are now concerned with the properties in the E schedule as they are the subject-matter of the suit. The said Karuppanna Pillai has created a trust in respect of the suit properties (E schedule in the will) and the dispute between the parties is regarding the validity of the said trust. The plaintiffs claim partition and separate possession of a 2/3 share (1/3 for each of them) in the suit properties on the ground that the trust created under the will of Karuppanna Pillai in respect of those properties is wholly invalid and that as per the other terms of the will, the said properties should be equally shared by the plaintiffs and the defendant who are the sons of Appavu Pillai.

2. Under the will Exhibit B-1, Karuppanna Pillai (hereinafter referred to as the testator) provided that the properties described in A, B, and C schedules shall be respectively taken and be in the possession of the defendant, the 1st plaintiff and the 2nd plaintiff, who were directed to perform certain charities from out of the income of the respective properties. One Palaniammal and one Chellammal are the daughters of Appavu Pillai (sisters of the plaintiffs and the defendant). The testator created a life—estate in favour of the said Palaniammal and Chellammal in respect of the D schedule properties and directed that after their lifetime those properties shall be dealt with in the same way as the E schedule properties. But we are not concerned in the present litigation with any of the properties in schedules A to D for only the E schedule properties are made the subject-matter of the suit.

3. As far as E schedule properties are concerned the recitals in the will are in the following terms. (The will is in Tamil and the particular portion has been translated by the first appellate Court and the correctness of the same is not in question :—

" After my lifetime, the aforesaid three persons, Ponnusami Pillai, Malayalam Pillai and Thangavelu Pillai, shall take and manage the E schedule properties; from out of the income from the said properties , pay the kist for the aforesaid E schedule properties and out of the balance of income, for the salvation of my soul after my lifetime, shall inter my body, after my life is extinct, in the land S. F. No. 68/B, Punjai Thottakurichi village, pertaining to the aforesaid E schedule, building structure therefor and put up light every day, shall plant flower plants in the said land and grow them, shall construct a *matam* for annual ceremonies, install pictures therein, put up light in the *matam* every day, conduct Guru Pooja once every year and at the time of the Guru Pooja, distribute saffron-coloured cloths to those that wear saffron-coloured cloths and on that day shall feed the poor. Since the aforesaid Ponnusami Pillai is the eldest of the sons, he shall be the manager to conduct the above matters. The surplus income shall be taken in the shares of 2/4 by Ponnuswami Pillai, 1/4 by Malaylam Pillai and 1/4th by Thangavelu Pillai. After the said Poonusami Pillai's life, out of the male heirs, the eldest son shall conduct in the same manner as above and the surplus income shall be taken by the said eldest son."

Lower down in the will, there is a residuary clause, the English translation of which is in the following terms:—

"The movable and immovable properties belonging to me and not mentioned herein shall be taken and enjoyed by the aforesaid three persons after my lifetime."

4. The case of the plaintiffs has been that the bequest of E schedule properties as found in the portion of the will extracted above is invalid in law inasmuch as the bequest is for *samadhi kainkaryam*, that the residuary clause under which properties not dealt with by the will shall be shared by the plaintiff and the defendant comes into operation and that therefore they are entitled to partition and separate possession of their 2/3 share in the said properties. They also prayed for an account from the defendant regarding the income from the properties from 27th February, 1949, the date on which the plaintiffs had given notice to the defendant making their demand for partition.

5. The defendant resisted the suit *inter alia* contending that the suit properties had not been bequeathed for *samadhi kainkaryam* as sought to be made out by the plaintiffs, that the bequest was for constructing and maintaining a *matam* wholly unconnected with the *samadhi* and for performing Guru Pooja, distribution of saffron cloths to mendicants and feeding the poor only at the *matam* that therefore there is no question of the bequest becoming invalid and that the plaintiffs are not entitled to claim partition and separate possession of the properties treating the same as properties bequeathed to the parties.

6. The trial Judge, *viz.*, the learned Subordinate Judge, Tiruchirapalli, decreed the suit holding that the bequest was invalid and that the plaintiffs and the defendant got the properties under the residuary clause in the will. The defendant went in appeal in A. S. No. 100 of 1958 and the learned District Judge differed from the trial Judge on the question whether the bequest in respect of the E schedule properties is valid or not. Holding that the bequest was valid, he dismissed the suit as far as the same related to the prayer for partition and separate possession of the property. However, as the defendant was bound to render an account regarding the balance of the income (after meeting the expenses conected with the trust) and the will contemplated sharing of the balance of the income between the defendant on the one hand and the plaintiff on the other, the learned District Judge held that it was not necessary to drive the plaintiff to file another suit for accounts. Therefore, while dismissing the claim for partition and separate possession, he gave a decree only for accounts regarding the income from the properties from 27th February, 1949. Then the plaintiff filed the second appeal which was heard by Veeraswami, J., (as he then was). The learned Judge found that the bequest in respect of the E schedule properties partly related to the maintenance, etc., of the *samadhi* of the testator and partly related to the construction and maintenance of the *matam* in which various functions and charities had to be performed and that the bequest regarding the former part was invalid, while that in respect of the latter part, *viz.*, relating to the *matam* was not invalid. Therefore the learned Judge directed the matter to be sent to the trial Judge for the purpose of apportioning the properties referable to the tomb (*samadhi*) and those referable to the *matam* and the charities to be performed therein. The defendant's liability to render account was confined to the properties that would be apportioned by the trial Court as referable to the *matam* and the charities to be performed therein.

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7. The first appellate Court as well as the learned Judge who heard the second appeal were of the opinion that, in any event, the residuary clause in the will, on which the plaintiff placed reliance for claiming partition and separate possession of the properties, would not help them because that clause relates only to properties not dealt with under the will. The finding is that the suit properties being those that were actually dealt with under the will, though the bequest is now held to be invalid, it must be held that the testator died intestate as far as those

properties are concerned. The first appellate Judge pointed out that under such circumstances there would be no question of the plaintiffs and the defendant sharing the properties inasmuch as their grandfather Marudanayakam Pillai (brother of Karuppanna Pillai, the testator) is still alive and he will be the nearest heir entitled to succeed to properties regarding which there is intestate succession. The learned Judge who heard the second appeal is also of the same opinion and therefore, even though he held that the bequest in respect of part of the properties referable to the *samadhi* is not valid, he found that the plaintiffs are not entitled to partition and that their suit for partition should fail. The learned Judge said that the properties referable to the tomb will be determined and separated and the same will be regarded as undisposed of by the testator under his will. The plaintiffs have filed the present Letters Patent Appeal pressing their contention that the entire bequest in respect of the E schedule properties is invalid, that the residuary clause in the will did apply to E schedule properties on the bequest relating to the same failing and that therefore they are entitled to partition and separate possession of the properties.

8. In the two Courts below as well as before the learned single Judge who heard the second appeal, the plaintiffs had raised another contention that there was vesting of the E schedule properties in the plaintiffs and the defendant as per the terms of the will and that therefore the further clauses in the will creating a trust over the said properties for the purposes stated therein would have no effect at all. If this contention is accepted, then one need not consider whether the creation of the trust over the E schedule properties is invalid on the ground that it was a bequest to a *samadhi* and for purposes connected with it. However, the above contention that as per the terms of the will the entire E schedule properties came to be vested in the plaintiffs and the defendant on the death of the testator, has been rightly negatived and the same is not seriously pressed before us. The plaintiffs chose to put forward such a contention on the strength of the word "அடைந்து" before the other words bequeathing the properties for the purposes stated therein. But the entire provision has to be read as a whole in order to see whether the testator had intended to vest the properties absolutely in the plaintiffs and the defendant on his death. Undoubtedly there was no such intention on the part of the testator as far as the E schedule properties are concerned. Therefore the learned Counsel for the plaintiffs (appellants) rightly does not press that point before us. The question is about the true construction of the particular provision in the will in order to see whether the properties were dedicated to the *samadhi* of the testator and for purposes connected thereto. In other words, the question is whether the E schedule properties had been bequeathed for *samadhi kainkaryam* as contended by the plaintiffs.

9. The learned Judge who heard the second appeal states that he should confess to some difficulty in the process of arriving at a conclusion as to the proper construction of the will relating to the E schedule and that his first thought, upon a reading of the E schedule, was that it provided for a single scheme of endowment and that the provision in favour of the tomb was not separable from the provision for *matam* and performances therein. But the learned Judge ultimately held that the dedication was separable into two parts and one part, *viz.*, that relating to the *matam* is valid. Though the learned Judge says that he is of the opinion that the view of the learned District Judge as to the nature and scope of the E schedule is correct, the conclusion of the learned District Judge and that of the learned Judge who heard the second appeal are different. As already seen, the first appellate Court held that the entire bequest in respect of the E schedule was valid. But the learned Judge who heard the second appeal came to the conclusion that there is dedication of property to the tomb of the testator and to that extent the bequest should fail, and as the dedication of property under the same schedule to the *matam* and the performances therein was separable from that in favour of the tomb, the bequest in favour of the former (*matam* and the performances therein) is valid. That is why the learned Judge remitted the matter to the trial Court for allocating the

E schedule properties towards endowments referable to the tomb and that to the *matam* and the charities to be performed therein. After a careful consideration of the provisions of the will in the light of the Privy Council case *Subramania* v. *Draviyasundaram*[1], we have to come to the conclusion that the first impression of the learned Judge regarding the validity of the provision in the will is correct. With respect to the learned Judge, we are unable to share his view that the bequest is separable as partly to the tomb and partly to the *matam* and the performances therein. We are clearly of the opinion that the entire bequest is invalid because it is only an endowment to the tomb of the testator and the *matam* is only an adjunct to the tomb. We are of the opinion that the *matam* cannot be considered as a separate entity dissociated from the tomb.

10. It is not in dispute before us that an endowment in relation to a tomb is not valid in law, though dedication of property for annual *sradh* has always been held to be valid. In *Saraswathi* v. *Rajagopal Ammal*[2] the dedication of property was construed as one not meant for the annual *sradh* or education as such but only as part of *samadhi kainkaryam* and that dedication was held to be wholly invalid. In that connection, their Lordships of the Supreme Court have referred to with approval three decisions of this Court which have held against the validity of dedication of property to a tomb and for purposes connected with the tomb. Perhaps if the tomb is that of a Hindu saint dedication of property to such tomb might be upheld as valid. Their Lordships of the Supreme Court have observed in the above case at page 909 :—

> "There have been no doubt instances of Hindu saints having been deified and worshipped but very few, if at all have been entombed and we are not aware of any practice of dedication of property for such tombs amongst Hindus. Such cases, if they arise, may conceivably stand on a different footing from the case of an ordinary private individual who is entombed and worshipped thereat."

In the present case, admittedly the testator was not a Hindu saint and if the dedication of property is to his tomb and matters connected with it, surely the dedication is not valid.

11. It could not be disputed before us by the learned Counsel for the respondent that there is dedication of property to the testator's tomb and to that extent the dedication should fail. The learned Judge who heard the second appeal has held that there was dedication of property to the tomb, that the same is invalid and that portion of the E schedule property referable to such dedication should be ascertained and the same should be treated as property regarding which the testator died intestate. To that extent the second appeal has been allowed by the learned Judge. But the respondent-defendant is not challenging that part of the judgment of the learned Judge. Therefore the question is whether the bequest can be considered to be in favour of two separate entities, *viz.*, the tomb and the *matam*, and whether that part of the bequest to the *matam* and the purposes therein can be considered to be valid. As we said earlier, we are of the opinion that the bequest is to one single entity and the same was only for the tomb and matters connected with it.

12. We have to note the dominant intention of the testator in creating the endowment. He says that he was creating the endowment for the salvation of his soul. For that purpose he directs that his body shall be interred in the land bearing S.F. No. 68/B (one of the items in E schedule) and that tomb should be built over the place where his body is interred. He also directs that there should be lighting at the tomb every day. The further direction is that flower plants should be planted in the land in question. The learned Judge who heard the second appeal has held that the endowment referable to the tomb, lighting of the tomb every day and growing flower plants in the land is invalid. The further direction made by the testator is that for the purposes of conducting the annual ceremonies (ஆப்திகத்திற்காக) a *matam* should be built on the same land (S.F. No. 68/B), that pictures (of Gods) should be installed therein, that this *matam* also should be lighted every day and once a year Guru Pooja should be conducted

1. A.I.R. 1950 P.C. 37.
2. (1953) 2 M.L.J. (S.C.) 803: (1954) S.C.R. 277: 1953 S.C.J. 714: A.I.R. 1953 S.C. 491.

in the *matam*, when saffron clothers should be distributed to mendicants and that poor should be fed on that day. It is in evidence that a tomb as well as a *matam* have been built on the land in question and the defendant, who has been directed to be the Manager of the endowment as per the terms of the will, has been conducting the lighting, Guru Pooja, poor feeding, etc., as contemplated under the will. It is also in evidence that the tomb and the *matam* are close to each other on the said land.

13. It has been the case of the defendant-respondent in the trial Court as well as in the first appellate Court that Guru Pooja referred to had nothing to do with the death anniversary of the testator, that "guru" meant the Adhi Guru, *viz.*, Lord Subramanya and that the Guru Pooja meant only festival for Lord Subramanya on the Thai Poosam day. The learned Subordinate Judge, before whom such contention had been put forward at the time of the trial rejected the same. It is pointed out by him that such a contention is against the pleading in the case inasmuch as the defendant has not stated a word in his written statement that Guru Pooja referred to in the will is festival for Lord Subramanya. The learned District Judge, Tiruchirapalli, who heard the first appeal was of a different view on this point. The learned Judge who heard the second appeal did not decide this point. But we think the question whether Guru Pooja referred to in the will is festival for Lord Subramanya or whether it is one connected with the death anniversary of the testator, has some relevance in deciding the main question. We have no doubt that the view of the learned Subordinate Judge on this point is correct and there is absolutely no warrant for thinking that Guru Pooja referred to in the wil l related to Pooja or festival for Lord Subramanya. The learned Subordinate Judge has referred to several documents. such as Exhibits A-5, A-6, A-7, A-8, A-9, A-12 and A-13 which make it abundantly clear that Guru Pooja was only in connection with the death anniversary of the testator and that the same was being performed every year on Mirugaseersha Nakshatram day in the month of Margazhi as it was on that date the testator died. The learned District Judge who heard the first appeal without giving due weight to the documentary evidence available in the case as well as the pleadings, seems to have thought that 'Guru' meant 'Adhi Guru", *viz.*, Lord Subramanya and therefore Guru Pooja referred to in the will was only pooja for Lord Subramanya. It is not disputed that Guru Pooja was meant to be performed and, as a matter of fact, was being performed only on the date of death anniversary of the testator and not on Thai Poosam day which is the Jayanthi day for Lord Subramanya. This fact makes it abundantly clear that Guru Pooja was not meant to be Pooja for Lord Subramanya, but it was only Pooja connected with the death anniversary of the testator. Evidently, the testator wanted to raise himself to the position of a Guru (saint) and he wanted that there should be worship at his tomb not only every day, but there should be specially worship (Guru Pooja) on his death anniversary. It is true that in the *matam* pictures of Gods have been installed and, as a matter of fact, that is in accordance with what the testator contemplated in the will. The picture of Lord Subramanya is also there in the *matam*. Much seems to have been made of the fact that the 1st plaintiff's marriage came to be performed in this *matam* itself and in that connection, the *matam* was described as Subramanya Sannadhi. Neither the performance of the marriage of the 1st plaintiff nor the abovesaid description of the *matam* would in any way affect the position regarding what the testator meant by Guru Pooja in that *matam*. We have absolutely no doubt that Guru Pooja referred to in the will is only in connection with the death anniversary of the testator. If the dedication is only for the performance of *sradha*, that would not make the same invalid. But performing, Guru Pooja is not the same thing as performing *sradha*. On a reading of the entire provision wherein the testator directed that a *samadhi* should be built and a *matam* also should be built, that the *samadhi* should be lighted every day, that there should be pooja every day and further there should be Guru Pooja, it is quite clear that the dedication is for the tomb and purposes connected with the tomb. The *matam* and the performances therein are not separate from the *samadhi* itself.

14. The Privy Council case referred to above squarely applies to the facts of this case. There the testator directed that his body should be buried in a *samadhi* and at the same place where the *samadhi* is made, a *matam* should be built with a stone inscription in the front portion of the *matam* " Kanakasabhapathi Samadhi Matam ", that regular worship should be conducted permanently therein and Guru Pooja also should be conducted every year and also provided in clauses 16 and 18 of that will for erecting of a temple for certain idols in the same land and for poor feeding, etc. and endowed certain properties for all the above purposes. Their Lordships of the Privy Council observed at page 38 (column 2) and page 39 (column 1) :—

> " It is clear, their Lordships think that the directions embody a single scheme. The testator contemplated that he would be buried as a sanyasi in a samadhi matam, and in connection therewith, and with a view to keeping his memory alive and enhancing his own posthumous reputation, the testator provided for feeding the poor and for erecting a temple for the idols, which would have the effect of attracting pilgrims. It is important to notice that the erection of the *matam* for the feeding of the poor and the erection of the temple for the installation of the idols under clause 16, were to be on the same item of land as the burial place, and that under clause 17, feeding of the poor was to be conducted during the pujas to be performed in connection with the burial place. If the provisions in clauses 16 and 18 stood alone, they might amount to a good charitable bequest : but they do not stand alone. Their Lordships can find no indication that the testator intended to establish any charity apart from the ceremonies to be conducted at his own burial place."

We are unable to find any difference between the endowment in the case before the Privy Council and that in the present case. It is significant to note that in spite of the fact that a temple for certain idols, quite distinct from the *samadhi* itself, had to be built on the same land where the *samadhi* is to be built, their Lordships of the Privy Council held that the endowment was one single scheme and that therefore the entire endowment failed. In the present case, there is not even the question of a separate temple. No doubt the *matam* has not been constructed actually over the tomb, but it is not disputed that it is close to the tomb and undoubtedly it is only an adjunct to the tomb. It appears to us that a *matam* close to the tomb has been built for the purpose of providing a convenient place for offering worship, etc. But none-the-less the worship is only connected with the tomb. The learned Judge who heard the second appeal, if we may say so with respect, firstly, rightly thought that because the provision is for constructing a *matam* on the same land as the tomb and close to the tomb itself, it was possibly a part of the endowment for the tomb. But the learned Judge seems to have been influenced by the fact that the testator had created independent endowments for charitable and religious purposes in respect of A, B and C schedule properties, in changing his opinion and ultimately holding that the endowment in respect of the E schedule is divisible and that, that part of the endowment relating to the *matam* has nothing to do with the tomb and therefore that part is valid. But we are of the opinion that the fact that the testator did endow A, B and C schedule properties for certain charities and put the properties in each schedule in the possession of the defendant and the two plaintiffs respectively, has not much relevance regarding the question whether the endowment relating to E schedule property is one endowment to the tomb and purposes connected with the tomb or otherwise. Therefore we hold that the bequest in respect E schedule completely fails.

15. The only other question as to whether the residuary clause in the will comes into play. The first appellate Court as well as the learned Judge of this Court are of the view that the residuary clause would have no application to the E schedule properties. It is no doubt true that the words used in the residuary clause, if literally taken without trying to ascertain the intention of the testator from the tenor of the entire will would not cover the E schedule properties, for the words are "properties not found herein" (" இதில் காணாத சொத்துக்கள் "). The

argument is that when the E schedule properties are actually dealt with under the will, they cannot be equated with properties not found in the will. But we have to ascertain what the intention of the testator is. When the testator said in the residuary clause that all properties not found in the will should be taken by the defendant and the two plaintiffs just in the same way as they took A, B and C schedule respectively, it is quite obvious that the testator did not want any property belonging to him going in intestate succession. He was very particular that his properties should go to the possession of the defendant and the two plaintiffs, of course with the endowments created over the same. If the endowment in respect of the E schedule properties failed, we are of the opinion that if the true intention of the testator is to be given effect to, the said properties should be put in the possession of the defendant and the two plaintiffs in equal shares so that they would take the properties just in the same manner they took the properties described in schedules A, B and C respectively. Considering all the circumstances of the case the word "இதில் காணாத" occurring in the residuary clause of the will should not be construed narrowly and they should be construed as taking in properties not disposed of by the other clauses in the will occurring earlier to the residuary clause. In respect of the E schedule properties the testator no doubt created an endowment, which however failed. Under the wider connotation of the words "இதில் காணாத" which we consider, under the circumstances of the case, as meaning properties not disposed of under the earlier clauses of the will, the E schedule properties should also be governed by the residuary clause of the will.

16. The result is, the Letters Patent Appeal is allowed, the decree of the first appellate Court and that in the second appeal are set aside and the decree of the learned Subordinate Judge (trial Court) is restored, except for the following modifications :—It is made clear that the defendant, who has been in possession of the E schedule properties in pursuance of the directions contained in the will, would be entitled to deduct all expenses incurred by him up to this date regarding the purposes mentioned in the will. The costs of the parties throughout to come out of the estate.

P.S.P. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Natarajan, JJ.*

S. Ramaswamy Naidu and others .. *Appellants* *

v.

Commissioner, Hindu Religious and Charitable Endowments, Nungambakkam High Road, Madras-34 and others .. *Respondents.*

Hindu Religious and Charitable Endowments Act (XXII of 1959)—Suit for setting aside order of Commissioner under the Act—Declaration—Temple—Public or private—Characteristics.

Where it is clear that by long usage and acceptance the public were visiting a temple and performing poojas therein and participating in the processions and daily poojas, this by itself raises a very strong presumption against the private character of the temple. [*Para.* 8.]

The existence of Moolasthanam, Mahamandapam, Prakaram, idols of chief and other deities, uthasavamoorthis, daily poojas, special poojas and procession during Navarathiri festival, worship by the local public belonging to different communities are all factors which positively give the undoubted impression that the temple is a public one. [*Para.* 10.]

Cases referred to :—

Narayan Bhagwantrao Gosavi Balajiwale v. *Gopal Vinayak Gosavi*, 1960 S.C.J. 263 : (1960) 1 S.C.R. 773 : A.I.R. 1960 S.C. 100 ; *Goswami Shri Mahalaxmi Vahuji* v. *Shah Ranchhoddas Kalidas (dead) and others*, (1970) 2 S.C.R. 275 : A.I.R. 1970 S.C. 2025.

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* Appeal No. 607 of 1967.

16th October, 1973.

Appeal against the decree of the Court of the Subordinate Judge, Dindigul, dated 24th October, 1964 and passed in Original Suit No. 36 of 1963.

V. C. Srikumar, for Appellant.

The Additional Government Pleader and *S. Baktavatsalam*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The plaintiffs for themselves and on behalf of 24 families of the Erumaikara Naicker community instituted a suit in the Court of the Subordinate Judge, Dindigul, to set aside the order of the first defendant *viz.*, the Commissioner, Hindu Religions and Charitable Endowments, Madras, who in turn confirmed that of the Deputy Commissioner whereunder the department declared a temple known as "Dhroupathi Amman Temple" situate in West Car Street, Dindigul Town as a public temple. The case of the plaintiffs as is seen from the pleadings is that the temple was established about 330 years ago by the families known as Santhakula Sowmiya Narayana Gowraya community or Erumaikara Naicker community and that these families were living in different places, such as, Dindigul, Madurai, Quilon, Palani, Palghat, Nilgiris, Calicut, Cannanore, Mananthavadi, Mercara and Sivaganga. It is admitted that there was no dedication of the temple. But it is contended that at no time the temple or its precincts or its accessories were built by subscriptions from the public. The plaintiffs are emphatic that the public did not contribute any amount towards the income of the said temple. According to the pleadings the temple was being maintained from marriage fees levied from the descendants of 24 families as above, Mahimai realised exclusively from them and the fine levied by the members of the community for any misconduct of its members. There are certain shops in and around the temple precincts and it is claimed that the rental income from the shops is added to supplement the income of the temple and they form a source for its maintenance and sustenance. They admit that in 1940 the Madras Hindu Religious Endowments Board attempted to interfere with the administration of the temple by appointing trustees thereto and by consent the offer of the then trustees of the temple to have such election of trustees periodically once in five years was accepted by the department. Ever since by rotation the trustees are being appointed by the Endowments Board Department. But in 1960 when attempts were made by the department to appoint an Executive Officer, the plaintiffs and defendants 2 to 4 filed an application under the provisions of Madras Act XXII of 1959 for a declaration that the temple is not a religious institution within the meaning of the said Act. That application was dismissed by the Deputy Commissioner and an appeal against that order of the Deputy Commissioner was equally unsuccessful. To set aside the said order the present suit was filed by the plaintiffs.

2. Considerable reliance was placed upon the observations made by this Court and the decision made in second Appeal No. 1037 of 1932, which was a case which arose on account of certain disputes between the trustees and the pujari of the temple. It is on these contentions the present action has been laid.

3. The first defendant in his written statement categorically maintains that the suit temple is not a private one, but a public one and bases his claim on the following features which are gathered from the pleadings :—(1) There is no record or evidence to show who built the temple and when it was built. The origin and construction of the temple is not known. (2) There is nothing to connect the old 24 families with the present families, who claimed a right to be in management and administration of the temple. (3) Municipal tax has been exempted as a place of public religious worship under the provisions of the District Municipalities Act. (4) For a period of 22 years and more the trustees have been appointed by the Religious Endowments Board in exercise of the powers under Act XXII of 1959. (5) The temple has been contributing its share to the Board and maintaining what is popularly known as "Register" under section 38 of the Act. (6) There is a regular audit by the department regarding the accounts of the temple. (7) The temple has been used as a place of public religious worship and as of right by members of the Eru-

maikara Naicker community and the general public. Commenting on the decision of this Court in S.A. No. 1037 of 1932 the defendants would state that there was no issue in that case whether the temple in question was a private or a public one. It was on such pleadings the parties went to trial.

4. The plaintiffs examined as many as 6 witnesses. The plaintiffs' witnesses fairly conceded that there was no deed of dedication. But P.W. 1 would say that there were hundis inside the temple and that there were registers maintained as regards certain collections made by the temple from the public and that that register was not produced by him and that there is no restriction by the members of their community in the matter of offering public worship in the temple and ultimately he would say that he belongs to Erumaikara community and that the temple belongs to the community. He did not mention in his deposition that he prohibited any member of the public from rendering pooja to the deities inside the temple. P.W. 2 also maintains that the suit temple belongs to Erumaikara community. Though in the chief examination he says that only their community people offer worship in the temple, he would pretend in cross-examination that during his visit to the temple, he has not seen other community people in the temple. He says that he visited the temple only during some of the meetings and Navarathiri festival time. As regards the hundis the specific case is that there is no sign board in the hundis prohibiting persons of other community from putting monies into it. They can put money into the hundis "தாராளமாகப் போடலாம்" P.W. 2 would say that only his community people and none else would come to the temple. There is no sign board to indicate that other community people should not enter the temple. To a similar effect is the evidence of the other witnesses.

5. It is not claimed by Mr. Rangaswami Iyengar that any deed or dedication was filed in the trial Court to sustain that the temple originated as a private temple and continued to be so in spite of the manner and pattern by its user for 3 centuries and more. In the wake of this evidence the learned Subordinate Judge found that the documentary evidence let in and which he considered, such as, Exhibits B-9, B-10, B-11, B-12 and B-14 to B-20 were all documents which did not establish positively that the temple was originally founded by the community people and was dedicated to the section of the community and for its benefit. In fact, he refers to the deposition and the evidence of P.Ws. 1 to 6, who are unable to say as to who founded the temple and who built the temple and when. In such a state of affairs the learned trial Judge was unable to accept the self-serving assertion of the plaintiffs that the temple is a private one. Whilst endorsing the views expressed by the learned Subordinate Judge, we like to add that there is also no proof that the plaintiffs or the successors of the 24 families of the community seem to have taken the initiative to put up the temple with the prakaram and instal the idols therein, the ordinary features which a Hindu temple would possess. From the pleadings it is seen that the 24 communities came from various districts or probably States, some of them from the State of Madras and some from the State of Kerala and the State of Mysore. The plaintiffs are unable to prove by acceptable evidence that they are the successors of such 24 families who seem to have constructed the temple centuries ago.

6. In the above perspective the other features and the incidents which are running with the temple for a considerable length of time, by usage, by conduct and by acceptance may immediately be noticed. Nearly 20 years ago the Religious Endowments Board interfered and wanted that a body of the trustees should be appointed to administer the affairs of the institution. The so-called members of the Community, who are in charge of the temple, did not protest against such interference by the Board. But, on the other hand, they agreed to the constitution of the said body of trustees and it is the said trustees, who are so constituted under the old Act, are functioning now as the body in charge of the affairs of the temple in question.

7. There is also the clinching factor about the existence of the 2 hundis in the temple to which the public were contributing liberally as spoken to by P.W. 2 and this was not objected to by any of the members

of the community or by the body of trustees who claimed to be the representatives of the Erumaikara Naicker community and the founders of the temple.

8. The third factor, which is again a strong circumstance against the view that the temple in question is a private temple, is that the public as of right were participating in almost all festivals and functions of the temple without any let or hindrance by those who claimed the exclusive right and privilege to so participate in it. As a matter of fact, though P.Ws. would claim that the public were not allowed to enter into the temple, some of the witnesses gave up this stand and admitted that the public were so allowed and they were allowed to contribute liberally to the hundials placed inside the temple premises. It is, therefore, clear that by long usage and acceptance the public were visiting the temple and performing poojas therein and participating in the processions and daily poojas and this by itself raises a very strong presumption against the private character of the temple. As was pointed out by the Supreme Court in *Narayan Bhagwantrao Gosavi Balajiwale* v. *Gopal Vinayak Gosavi and others*[1] :

> "The question of intention to dedicate the place for the use of the public or of the user by the public being as of right is necessarily a matter for inference from the nature of the institution and the nature of the user and the way the institution has been administered .... once a long course of user by the public for the purpose of worship is established, and the fact of a separate endowment in trust for the deity is also proved, it is fair to infer that the institution must have been dedicated for user by the public unless the contrary is established —particularly when the character of the temple, its construction, the arrangement of the various parts of the temple and the nature of the deities installed there are similar to what obtains in admittedly public temples. Similarly, when user by the public generally to the extent to which there is a worshipping public in the locality is established, it is not unreasonable to presume that the user by the public was as of right, unless there are circumstances clearly suggesting that the user must have been permissive or that the authorities in charge of the temple have exercised such arbitrary power of exclusion that it can only be ascribed to the private character of the institution."

1. 1960 S.C.J. 265: (1960) 1 S.C.R. 733: A.I.R. 1960 S.C. 100 at 110.

With respect, adopting the language of the learned Judges of the Supreme Court we do find in the instant case that the public have been visiting the temple and performing poojas therein and there are no circumstances suggesting that the user was permissive or that the authorities in charge of the administration of the temple ever exercised the right so as to exclude such members of the visiting public.

9. To a similar import is the decision of the Supreme Court in *Goswami Shri Mahalaxmi Vahuji* v. *Shah Ranchhoddas Kalidas (dead) and others*[1], which runs thus :

> "The circumstances that the public or a section thereof have been regularly worshipping in the temple as a matter of course and they can take part in the festivals and ceremonies conducted in that temple apparently as matter of right is a strong piece of evidence to establish the public character of the temple."

10. In the light of the ratio of the decisions of the Supreme Court and the facts and the circumstances of this case we are satisfied that the institution in question does not bear the trappings of a private temple. On the other hand it is a public temple, as rightly pointed out by the trial Judge. The existence of Moolasthanam, Mahamandabam, Prakaram, idols of chief and other deities, uthsavamurthies, daily poojas, special poojas and procession during Navarathiri festival, worship by the local public belonging to different communities are all factors which positively give the undoubted impression that the temple is a public one.

11. No doubt reliance is made on the observations made by this Court in S.A. No. 1037 of 1932. That was a case where the trustees took action against the poojari

1. (1970) 2 S.C.R. 275: A.I.R. 1970 S.C. 2025 at 2031.

for misconduct. In that the poojari accepted certains contributions from the temple without the trustees' knowledge. Apparently the trustee's found fault with the poojari and the poojari was dissatisfied with the decision of the Board of trustees. This was the subject-matter of the dispute which ultimately came up for decision by this Court. There was no point either directly or indirectly in issue in that suit regarding the public or private nature of the temple. It is by now well-established that a decision in an earlier action between the appropriate parties can either operate as *res judicata* or as binding authority on them only if the earlier action raises certain issues which are substantially the same as those raised in the later action. But if the subject-matter of the earlier action is totally different and if the circumstances under which the parties litigated are entirely distinct, then the resultant decision in that suit may not have an impact or bearing while considering the real issues that arise in another case and which bears on a subject which is totally alien to the one which was the subject-matter in the earlier suit. That is the position here. In S.A. No. 1037 of 1932 there was no issue as to whether the institution was a private or a public temple, whereas the only issue in the present action is whether the institution is a private temple or a public temple. The decision on this would depend on the evidence let in by the persons in management or control of that institution. Mere assertions by trustees of their right to punish a poojari on the assumption that he misconducted himself would by itself not render the position clear, nor would it establish by itself the fact that the temple in question is a private one.

12. We have already traversed the oral and documentary evidence in this case as also the law as declared by the Supreme Court in the various decisions. We are satisfied that in the instant case there is clinching evidence to show that the institution is a public temple. Applying the principles and the well-known decisions to find whether a temple is a private or a public temple, we are of the view that the learned Subordinate Judge of Dindigul was right when he declared the institution as a public temple and confirmed the order of the first defendant.

13. In this view, the appeal fails and is dismissed. There will be no order as to costs.

S.J. *Appeal dismissed.*

IN THE HIGH CCURT OF JUDICATURE AT MADRAS.

PRESENT:—*N. S. Ramaswami, J.*

C. Easwaramoorthy .. *Petitioner**

v.

Ramakrishnan .. *Respondent.*

Court-fees Act (*XIV of* 1955), *section* 69—Ex parte *decree—Set aside on application—Suit dismissed subsequently as settled out of Court—Refund of half the Court-fees claimed—Section* 69—"*Before any evidence has been recorded on the merits*"—*Meaning of*—Ex parte *evidence after* ex parte *decree is set aside has no value.*

The fact that the Court recorded evidence at the *ex parte* stage would not debar a plaintiff from getting refund of half the Court fee under section 69 of the Court-fees Act. [*Para.* 2.]

Exparte evidence should be treated as *non est* once the *ex parte* decree is set aside. [*Para.* 3.]

If the *ex parte* decree is set aside the parties would be in the same position as they were before recording of *ex parte* evidence. If the suit is settled out of Court after the *ex parte* decree is set aside such settlement is clearly before "any evidence has been recorded" for the *exparte* evidence originally recorded had been wiped out as it were, by setting aside of the proceedings. When the settlement was reported there was no evidence on record. That means section 69 of the Court-fees Act is applicable and the plaintiff is entitled to refund of half the Court-fees. [*Para.* 3.]

Cases referred to:—

Solamalai Mudaliar v. *Vadamalai Muthiran*, (1912) 23 M.L.J. 273; *Phani Bhusan*

* C.R.P. No. 1946 of 1970.

7th September, 1973.

Mukharjee v. *Phani Bhusan Mukharjee*, A.I.R. 1957 Cal. 170 at 171; *Mst. Lakshmi Devi* v. *Roongta & Company*, A.I.R. 1962 All. 381.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the City Civil Court, Madras (III Assistant Judge) dated 24th November, 1969 and passed in O.S. No. 3490 of 1968.

B. Lakshminarayana Reddy, *R. V. M. Nallasivam* and *G. Kathirvelu*, for Petitioner.

Ramakrishnan, for Respondent.

The Court made the following

ORDER.—This revision petition raises the question as to whether the plaintiff is entitled to refund of half the Court-fees on the suit having been dismissed as settled out of Court but in which there was originally an *ex parte* decree which was later set side. There is no direct authority on the point. Section 69 of the Court-fees Act (XIV of 1955) says that:

> "Whenever any suit is dismissed as settled out of Court before any evidence has been recorded on the merits of the claim half the amount of all fees paid in respect of the claim or claims in the suit shall be ordered by the Court to be refunded to the parties by whom the same have been respectively paid".

In the present case, there was an *ex parte* decree and that decree was set aside on the defendant's filing an application. Ultimately, the matter was settled out of Court and the suit was dismissed accordingly. The plaintiff applied for refund of half the Court-fee on the footing that section 69 of the Court-fees Act applies. The Court below has held that evidence having been once recorded, that is, when the suit was decreed *ex parte*, the plaintiff is not entitled to a refund. The question for consideration is whether the *ex parte* evidence recorded, on the basis of which a decree was passed and which had been subsequently set aside, is "evidence recorded on the merits" as contemplated under section 69 of the Court-fees Act.

2. There is authority for the proposition raised by the learned Counsel that the evidence recorded while passing an *ex parte* decree, which was ultimately set aside, is not evidence at all. Therefore, the fact that the Court did record evidence at the *ex parte* stage, does not debar the plaintiff from getting a refund of half the Court-fees under section 69 of the Act. In *Solamalai Mudaliar* v. *Vadamalai Muthiran*[1], a promissory note was proved while recording *ex parte* evidence. Subsequently, the *ex parte* decree was set aside and the matter went for trial. The defendant objected to the admissibility of the promissory note as not properly stamped. The plaintiff invoked section 36 of the Indian Stamp Act. The question arose as to whether the plaintiff could so invoke section 36 of the Stamp Act on the strength of the fact that the promissory note has already been admitted in evidence at the *ex parte* stage. This Court held at page 275 that:

> "When the promissory note was put in at the second trial the document did not remain as evidence. The whole *ex parte* proceedings had been set aside and the trial of the suit had to commence *de novo*.........the promissory note had to be tendered in evidence at the second trial as the previous proceedings proved abortive in law when they were set aside.
>
> Technically, no doubt, the suit is regarded as the same though the *ex parte* decree might be set aside. But in substance the proceedings are different when they recommence at the setting aside of *ex parte* decree".

In *Phani Bhusan Mukharjee* v. *Phani Bhusan Mukharjee*[2], it has been held:

> "The effect of the order setting aside the *ex parte* decree is that all proceedings subsequent to the stage of the defendant's non-appearance would no longer bind him. In other words, as the defendant's non-appearance was condoned by the setting aside of the *ex parte* decree, the evidence which was recorded in his absence will not also be admissible against him".

The same view is expressed by the Allahabad High Court in *Mst. Lakshmi Devi* v. *Roongta & Co.*[3];

3. All these decisions proceeded on the footing that the *ex parte* evidence should

1. (1912) 23 M.L.J. 273.
2. A.I.R. 1957 Cal. 170 at 171.
3. A.I.R. 1962 All. 381.

be treated as *non est* once the *ex parte* decree is set aside. I respectfully agree with that view. If the *ex parte* decree is set aside, the parties would be in the same position as they were before recording of *ex parte* evidence. If the suit is settled out of Court after the *ex parte* decree is set aside, such settlement is clearly before "any evidence has been recorded", for, the *ex parte* evidence originally recorded had been wiped out, as it were, by the setting aside of the proceeding. When the settlement was reported there was no evidence on record. That means that section 69 of the Court-fees Act is applicable to this case and the plaintiff is entitled to refund of half the Court-fees. The civil revision petition is allowed accordinly, but there will be no order, as to costs.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Natarajan, JJ.*

The State of Madras represented by the Collector of Ramanathapuram at Madurai .. *Appellant**

v.

Kasthuri Ammal and others .. *Respondents.*

Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963)*—Suit for declaration of title and compensation for site taken over—Site handed over to Panchayat for construction of water works in* 1960*—Works also put up—Act XXX of* 1963 *coming into force—Plaintiff claiming compensation for the suit site—Panchayat contending that title vested in State Government by virtue of Act XXX of* 1963*—Plaintiff whether entitled to compensation.*

The plaintiff handed over the suit site to the Executive Officer of Sivaganga Panchayat in 1960 for construction of water works. The water-works were constructed in 1961. Act XXX of 1963 received the assent of the President on 28th January, 1964 and came into force still later. When the plaintiff claimed compensation for the suit site, the Executive Officer, Sivaganga Panchayat claimed that a portion of the suit property comprised in Survey No. 74 was a minor inam and had vested in the Government by reason of the Minor Inams (Abolition and Conversion into Ryotwari) Act XXX of 1963 and as such, the plaintiff should seek her remedies only under the Act.

Held: The rights of the parties have got to be determined as on the date the cause action arose and, viewed in that perspective, the supervening event *viz.*, the introduction of Act XXX of 1963, cannot abridge or modify the right of the plaintiff to compensation as against the Executive Officer of the Sivaganga Panchayat. The right of the plaintiff can never be held to have been extinguished or curtailed by reason of Act XXX of 1963.

[*Paras.* 12 *and* 13.]

The decision in *Rengaraja Iyengar* v. *Achikannu Ammal*, (1959) 2 M.L.J. 513 : (1959) L.W. 767, stated the correct position of law and what applied to house-sites in gramanatham in estates taken over under the Madras Estates (Abolition and Conversion into Ryotwari) Act XXVI of 1948 should *mutatis mutandis* apply to minor inams taken over under the Madras Inams (Abolition and Conversions into Ryotwari) Act XXX of 1963.

[*Para.* 13.]

The law is well-settled that the statutory machinery created by either Act XXVI of 1948 or Act XXX of 1963 could exercise jurisdiction only in respect of those matters which were specified in the enactments and could not pervade the field of civil litigation which is exclusively that of the civil Court.

[*Para.* 14.]

Cases referred to :

Kandaswamy Nadar v. *Province of Madras*, (1952) 1 M.L.J. 804 : 65 L.W. 787 : A.I.R. 1953 Mad. 391 ; *State of Madras* v. *Kamakshia Pillai*, (1960) 1 M.L.J. 276 : (1959) 72 L.W. 770 ; *Rengaroja Iyengar* v. *Achikannu Ammal*, (1959) L.W. 767 : (1959) 2 M.L.J. 513 ; *State of Madras* v. *Umayal Achi*, L.P.A. No. 106 of 1959 ; *The State of Madras* v. *Parisutha Nadar*, (1961) 2 M.L.J. 285 ; *State of Madras* v.

* A.Nos. 767 of 1967 and 517 of 1968 and memo. of cross-objections. 21*st December*, 1973.

Ramalingaswamigal Madam, (1969) 2 M.L.J. 281; *Raja of Vizianagaram*, In re, (1953) 1 M.L.J. 289 : A.I.R. 1953 Mad. 416.

Appeals and Memo. of Cross-objections against the decree of the Court of the Subordinate Judge of Sivaganga, dated 30th September, 1966 and passed in Original Suit No. 9 of 1965.

N. Thiagarajan, for Additional Government Pleader, for Appellant.

P. Balasubramaniam, *A. Sundaram Iyer* and *K. Alagiriswami*, for Respondents.

The Judgment of the Court was delivered by

Natarajan, J.—The second and the third defendants in O.S. No. 9 of 1965 on the file of the Court of the Subordinate Judge of Sivaganga are the respective appellants in these two appeals and the memorandum of cross-objections has been preferred by the plaintiff therein.

2. The suit property, which the plaintiff conceded before the trial Court to be 14,534 sq. ft. in extent and not 16,800 sq. ft. as set out in the plaint, was purchased by the plaintiff under two sale deeds, Exhibits A-9 and A-10. On the plaintiff being approached during September-October, 1959 by the President and the Executive Officer of the Sivaganga Panchayat, the first defendant in the suit, for parting with the site to enable the panchayat to erect its water works thereon and on being promised proper compensation therefor as fixed by the Government, the plaintiff delivered possession of the suit site in May-June, 1960 to the first defendant and the first defendant constructed its water works on the site by December, 1961. When the plaintiff demanded the compensation amount, promised to her, the first defendant sent a reply stating that the Tahsildar had declared the suit site to be a Government poromboke and that as such, the plaintiff was not entitled to any compensation. It was thereafter, the plaintiff came forward with the suit for a declaration that she had title to the suit property and that she should be paid compensation for the site taken over by the first defendant at the rate of Re. 1 per sq.ft.

3. Besides the first defendant, the plaintiff impleaded the State of Madras as the second defendant and the Sivaganga Municipality which has succeeded the Sivaganga Panchayat, as the third defendant.

4. The defence set up by the first defendant and adopted by the third defendant was that the plaintiff and her predecessors-in-interest had no title to the suit property, that the first defendant never admitted the title of the plaintiff nor committed itself at any time to pay compensation for the transfer of the site, that the site had been declared to be a poromboke site and that, in any event, the compensation claimed was excessive.

5. The second defendant raised the defence that a portion of the suit site formed part of Survey No. 48 and was a road poromboke, that the remaining portion of the site forming part of Survey No. 74 was a natham poromboke, that Survey No. 48 had been taken ever under the Inam Abolition Act XXVI of 1963, that Survey No. 74 is a T. D. Minor inam which vested with the State Government under the Minor Inams (Abolition and Conversion into Ryotwari) Act XXX of 1963, that the plaintiff ought to agitate her remedies in the proper forum constituted under the said Act, that the civil Court had no jurisdiction to entertain the suit and that, in any event, the compensation claimed was excessive.

6. On these pleadings, the learned Subordinate Judge framed the following issues for trial :—

(1) Whether the plaintiff has title to the suit property ?

(2) Whether the first defendant is estopped from denying the title of the plaintiff?

(3) What compensation is the plaintiff entitled to ?

(4) Whether the suit is not maintainable because of the provisions of Madras Act XXVI of 1963 and Madras Act XXX of 1963 ?

(5) To what relief is the plaintiff entitled ?

After a careful consideration of the evidence adduced by the parties, the learned Subordinate Judge held that the plaintiff had title to the suit property, that the defendant was estopped from denying the title of the plaintiff, that the civil Court had jurisdiction to maintain the suit and that the plaintiff was entitled

to compensation for the site taken over from her. As regards the quantum of compensation the learned Subordinate Judge held that the rate of 25 paise per sq. ft. would be a reasonable one and consequently gave a decree for Rs. 3,633 together with interest and proportionate costs.

7. The second and the third defendants have filed their respective appeals to assail the findings of the learned Subordinate Judge while the plaintiff has filed the memorandum of cross-objections to claim enhanced compensation.

8. The three questions that fall for consideration before us in these proceedings are : (1) Whether the plaintiff had title to the suit property ? (2) Whether the civil Court had no jurisdiction to entertain the plaintiff's suit ? (3) Whether the plaintiff is entitled to enhanced compensation ?

9. It is not in dispute that the suit site measuring 14,534 sq. ft. is comprised in two survey numbers, *viz.*, S. No. 48 and S. No. 74. The site as well as the land adjacent to it were originally owned by one Veluswami Thevar. The sons of Veluswami Thevar conveyed the suit site under Exhibit A-6, dated 1st August, 1925 to one D. S. Srinivasa Iyengar and the latter, in turn, sold the same under Exhibit A-7, dated 14th February, 1930 to one Palaniappa Chettiar. The plaintiff purchased the southern half of the site from Palaniappa Chettiar under Exhibit A-9, dated 25th October, 1956. The other extent of the site was purchased by the plaintiff from one Muthukaliammal under Exhibit A-10, dated 9th June, 1957, the said Muthukaliammal herself having derived title to the same by means of a sale deed, Exhibit A-8, executed in her favour by Palaniappa Chettiar. The considerations for Exhibits A-9 and A-10 are respectively Rs. 1,500 and Rs. 500, thus making the total cost of the suit site to be Rs. 2,000.

10. From the evidence adduced by the plaintiff in the case, it is incontrovertibly proved that P.W. 8, the then President of the Sivaganga Panchayat, with the assistance of P.W. 1, a respectable mediator, induced the plaintiff to hand over the site to the first defendant on the assurance that the first defendant would pay compensation for the suit site at the rate fixed by Government. The documentary and oral evidence, to which reference has been made above, should normally be considered adequate to uphold the claim of the plaintiff. However, the contention of the defendants is that such portion of the suit site as lies within Survey No. 48 is a road poromboke and such remaining portion of it as lies in Survey No. 74 is a natham poromboke and that as such, the plaintiff is not entitled to any reliefs in the suit. Though the entire site is said to be comprised in poromboke land, the grounds on which the plaintiff is sought to be non-suited in respect of each of the porombokes are different and we shall therefore deal with those objections accordingly. So far as a portion of the suit site forming part of road poromboke in Survey No. 48 is concerned, the defendants would contend that survey operations were conducted in 1919 and in such survey operations, S. No. 48 had been demarcated by the survey authorities as a road poromboke. Except for expounding such a contention, the defendants have not placed any material before Court to show that survey operations were conducted in 1919, that in such survey operations S. No. 48 was demarcated as road poromboke and furthermore, that the then owner of the site was given notice of the demarcation effected by the survey authorities. Neither the publication effected by the survey authorities of the proposed survey nor the order of Government publishing the result of the survey, nor the copy of any notice served on the then owner of the suit site, has been filed before the trial Court. Without placing any of these clinching materials before the Court, the defendants would place reliance upon Exhibit B-4 a sketch of Survey No. 43 in the Field Measurement Book and upon the evidence of D.W.3, the village karnam to contend that survey operations were duly effected in 1919 and that Survey No. 48 was demarcated as road poromboke during such operations. D.W. 3 has no personal knowledge of the survey operations and his evidence, therefore, cannot carry any weight. In the absence of more clinching materials, to which reference has been made above, Exhibit B-4 which is nothing more than a sketch of Survey No. 48 in the Field Measurement Book cannot form the basis for a judicial verdict in favour of the defendants.

regarding Survey No. 48. Even assuming for argument's sake that survey operations were conducted in 1919 and those operations resulted in Survey No. 48 being labelled road poromboke, such actions cannot affect the plaintiff in any manner unless the defendants establish that the predecessor-in-interest of the plaintiff was given due notice of the result of the survey and the latter acquiesced in the correctness of the operations. In *Kandasamy Nadar* v. *Province of Madras*[1] this Court has categorically stated that a party concerned by an adverse survey, to whom no notice was given of the survey, is not bound to file a suit within three years to set aside the order of the Survey Officer because he had no notice of the survey and the orders on it cannot be said to be correctly passed under section 13 of the Madras Survey and Boundaries Act and binding on that party. On these grounds themselves, the defendants' case that the plaintiff cannot claim title to that portion of the suit site which is comprised in Survey No. 48 should fail. Additional evidence, however, is not wanting in this case to further militate the case of the defendants. As early as in 1925, there was litigation between the Union Board of Sivaganga on the one hand and the owners of the areas adjoining the suit site on the other on the question as to whether Survey No. 48 formed part of road poromboke. The proceedings which culminated in S.A. Nos. 204, 277 and 278 of 1929 in this Court went against the contention of the Union Board of Sivaganga, the then local body functioning at Sivaganga, that the suit locality formed part of road poromboke. There is, thus, abundant material in the case to dispel the defence contention that the plaintiff could not have validly owned that portion of the suit site which is referable to Survey No. 48. The learned Additional Government Pleader placed reliance upon section 2 (1) of the Tamil Nadu Land Encroachment Act (III of 1905) to contend that all public roads, streets, lanes and paths etc. have been declared under the said Act to be the property of Government and that as such, the contention of the defendants regarding Survey No. 48 should be upheld. This argument, in our opinion, merely begs the question. As we have stated earlier, unless the second defendant places reliable and acceptable materials before the Court to warrant the inference that survey operations in observance of all rules and regulations were effected during 1919 and that such operations had binding force on the predecessors-in interest of the plaintiff, the defendant cannot have recourse to and avail the provisions of Act III of 1905.

11. That takes us on to the contentions of the defendants regarding that portion of the suit site which is comprised in Survey No. 84. As Survey No. 74 is a natham poromboke and has been declared as minor inam, the defendants contend that the land had vested with the Government under Act XXX of 1963 and as such, the plaintiff can seek her remedies if any available to her, only in the forums constituted under the said Act. Section 3 (*b*) of the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 (hereinafter referred to as the Act) lays down that with effect on and from the appointed day and save as otherwise expressly provided in the Act, every minor inam including all communal lands and porombokes, waste lands, etc. shall stand transferred to the Government and vest in them free of all encumbrances. The argument, therefore, is that the trial Court ought not to have entertained the suit, but should have directed the plaintiff to seek her remedies through the machinery provided under the Act. To lend weight to this argument, the learned Additional Government Pleader places reliance on the pronouncement of this Court in *State of Madras* v. *Kamkshia Pillai*[1]. That was a case where certain ryots claimed fishery rights in a tank situated in the zamin village of Kulamangalam and which village was notified and taken over under Madras Act XXVI of 1948. They based their action upon customary right and also on acquisition of the right by purchase in public auction held by the Official Receiver. The contention of the ryots therein was that sections 11 to 15 of Act XXVI of 1948 which provided for ryots and landholders applying for grant of pattas, did not make any provision for an application being made for a patta for their fishery rights : and since the rights

1. (1952) 1 M.L.J. 804: 65 LW. 787 : A.I.R. 1953 Mad. 391.

1. (1959) 72 L.W. 770: (1960) 1 M.L.J. 276.

they claimed were not the creation of the land-holder, they cannot get any benefit by way of compensation or otherwise under the provisions of Act XXVI of 1948, and that as such, their case must be held to fall under the Madras Land Encroachment Act (III of 1905) which recognised customary rights and that, therefore, the civil Court was competent to maintain their suit and recognise and declare their rights. The Bench of this Court held that the declaration under Act III of 1905 was not a vesting declaration, but only a property declaration and that as such, the Act had already exhausted itself in its scope and application as to the character of the lands when once the declaration was made and all lands barring the excepted lands had become vested in the Government. The Bench further held that the estate of Kulamangalam vested in the Government only on and from the notified date under Act XXVI of 1948, that the application of Act III of 1905 to the said estate will commence only after the estate had vested in the Government and that as such, the plaintiffs therein cannot be heard to say that their customary fishing rights, the like of which have been exempted from the property declaration contained in section 2 (1) of Act III of 1905, were capable of recognition even before the estate had vested in the Government and were available for enforcement after the estate had been notified under Act XXVI of 1948 and taken over. It was in these circumstances, the Bench held that the customary rights claimed by the plaintiffs was divestitive so far as the landlord is concerned and investitive so far as the ryots are concerned, that the entire estate including the customary fishery rights claimed by the plaintiff vested in the Government by reason of section 3 (*b*) of Act XXVI of 1948 and that as such, the aggrieved plaintiffs should resort to the same remedies as are open to the ryotwari ryot under Act XXVI of 1948. We are clearly of opinion that the *ratio decidenti* of that case cannot have any application to the facts of the present case. Before proceeding to give our reasons for our conclusion in this behalf, we wish to advert to another factor which will repel the application of the provisions of Act XXX of 1963 to the suit property and the plaintiff's action for enforcement of her rights.

12. As we have stated earlier, the plaintiff, in deference to the request of the President of the Panchayat, handed over the suit site to the first defendant in 1960 itself and the uncontroverted evidence is that the first defendant also installed its water-works on the suit-site before the end of 1961. Act XXX of 1963 received the assent of the President only on 28th January, 1964 and came into force still later. Such being the case, there is hardly any force in the contention of the defendants that the minor inam comprised in Survey No. 74 vested in the Government by reason of Act XXX of 1963 and as such, the plaintiff should seek her remedies only through the machinery provided under the Act. Under the provisions of the Act, the plaintiff can only ask for the grant of a ryotwari patta in respect of the suit site. When the plaintiff had parted with the possession of the site and the first defendant had also built its water works, thereon, we are unable to understand the logic of the contention of the second defendant that the plaintiff should seek her remedies only through the forums provided under the Act. From the moment the plaintiff delivered the suit site to the first defendant for the construction of its water-works, the plaintiff became entitled to get compensation for the suit-site. It is not, and it can never be, the contention of the second defendant that this right of the plaintiff, *viz.*, to recover compensation, also vested in the Government on the introduction of Act XXX of 1963. It is needless to say that the rights of parties have got to be determined as on the date the cause of action arose, and viewed in that perspective, the supervening event, *viz.*, the introduction of Act XXX of 1963, cannot abridge or modify the right of the plaintiff as against the first defendant. Be that as it may, even assuming that Act XXX of 1963 must be held to have enmeshed the anterior rights of the plaintiff, the question for consideration is whether the plaintiff is not entitled to maintain her action for compensation and whether the civil Court is not entitled to maintain the action.

13. Inasmuch as Survey No. 74 is a natham poromboke, such portion of the suit site which is comprised therein must be held to be a house-site and the possession of which the plaintiff is entitled to

cling to and resist all invasion. Such a right of the plaintiff can never be held to have been extinguished or curtailed by reason of Act XXX of 1963. It must also be stated with equal force that any interference or invasion with the said right of the plaintiff is always challengeable in appropriate proceedings before the civil Court. A case similar to the one on hand arose under Act XXVI of 1948, *viz.*, *Rengaraja Iyengar* v. *Achikannu Ammal*[1] and Subramanyam, J. decided the case thus : In order that a land may properly be described as house-site within the meaning of section 2 of the Madras Land Encroachment Act, 1905, it is not necessary that there should be a residential building actually constructed and standing on the site. Lands which are within the limits of the gramanatham and on which buildings or sheds may be put up when necessary should also be house-sites within the meaning of the section whether such buildings are constructed or not ....The provisions as to vesting of lands under section 3 (*b*) of the Act (XXVI of 1948) should be read so as to be in conformance with the provisions regarding the applicability of the enactments relating to ryotwari areas. House-sites in gramanatham, therefore, could not stand vested in the Government under section 3 (*b*) of the Estates Abolition Act." We are of opinion that this decision states the correct position of law and that what applies to house-sites in gramanatham in estates taken over under Act XXVI of 1948 should *mutatis mutandis* apply to minor inams taken over under Act XXX of 1963.

14. We may also usefully refer to some other decisions which hold that the statutory machinery provided under Act XXVI of 1948 or Act XXX of 1963 as the case may be can have jurisdiction only in respect of those matters, such as the grant of ryotwari patta, provided under the Act and that such machinery, being the creatures of the statutes, cannot deal with a civil right, the determination of which can be done only by a civil Court. In *State of Madras* v. *Umayal Achi and another*[2], it was held that the civil Court had jurisdiction to entertain the suit for a mere injunction restraining the Government from arbitrarily and oppressively applying the provisions of the Land Encroachment Act to persons like the plaintiff who have been in occupation of lands in a notified estate even prior to the date of the notification. In *The State of Madras* v. *Parisutho Nadar*[1] it has been held that it is not open to the Government in the course of the proceedings to put forward its own title property sought to be acquired so as to defeat the rights of the persons entitled to the compensation. In *State of Madras* v. *Ramalingaswamigal Madam*[2] a Bench of this Court held as follows : "It is clear from the provisions of the Act (XXVI of 1948) that what really vests in the Government in respect of a ryoti or private land is merely title and there is no vesting of possession, which is protected under the proviso to section 3 (*d*) of the Act. So long as the possession of the land continues to vest in the ryot, he would be entitled to protect his rights in respect of the same by resorting to civil Courts." Though there is a long catena of decisions in this behalf, we have adverted to a few only as it is unnecessary to make reference to all of them in view of the fact that the law is now well settled that the statutory machinery created by either Act XXVI of 1948 or Act XXX of 1963 can exercise jurisdiction only in respect of those matters which are specified in the enactments and cannot pervade the field of civil litigation which is exclusively that of the civil Court. The learned Additional Government Pleader invited our attention to a Bench decision of this Court in *Raja of Vizianagaram, In re*[3] which, according to him, has a bearing on the case. A scrutiny of the judgment, however reveals that the *ratio decidenti* in that case has no application whatever to the controversy raised for decision in the appeal. In the abovesaid case, the Raja of Vizianagaram contended that certain house-sites, though forming part of the estate of Vizianagaram, must be held to be sites given free to the zamindar without any additional assessment and that therefore, the vacant sites must be held to fall outside the scope of the per-

1. (1959) L.W. 767: (1959) 2 M.L.J. 513.
2. L.P.A. No. 106 of 1959.

1. (1961) 2 M.L.J. 285.
2. (1969) 2 M.L.J. 281.
3. (1953) 1 M.L.J. 289: A.I.R. 1953 Mad. 416.

manent settlement. Rajamannar, C.J., and Venkatarama Aiyar, J. (as he then was), if we may say so with great respect, rightly held that the contention was fallacious because what passed to the zamindar under the sanad was not confined to the lands on which *peshkush* was calculated and that the fact that in 1802 no income accrued to the zamindar in the house-sites did not really affect the question. It is also significant to note that the Bench, notwithstanding such a pronouncement held, that "the right of the Government to take over the house-sites also along with the estate was however, subject to the claim of the zamindar, if any, under section 12 and similar provisions of Act XXVI of 1948 to be granted ryotwari pattas."

15. The facts of this case which have already been expatiated by us have reference to a house-site owned by a person who is not an estate-holder and the owner of the site, apart from being entitled to the grant of a patta, is equally conferred by law a right to defend his possession and enjoyment. If, instead of her action for compensation, the plaintiff were to sue for an injunction based on her right of possession, her right to maintain the civil action can never be questioned. In like manner, when the plaintiff sues for compensation for the deprivation of the possession of her land, she is, in no way, worse off than when maintaining her action for retention of possession. Therefore, the second contention of the defendants to non-suit the plaintiff is a futile one and has therefore been rightly rejected by the trial Court. Consequently, the first defendant, now suceeded by the third defendant, cannot escape its liability to pay compensation to the plaintiff for the suit site, and the appeals by the second and the third defendants have therefore to fail.

16. Turning our attention to the memorandum of cross-objections, the plaintiff feels aggrieved that as against her claim for compensation at the rate of Re. 1 per square foot the learned Subordinate Judge has granted only 24 paise per square foot. To give an estimate of the prevailing market value of lands in the locality of the suit site, the plaintiff has exhibited three sale deeds, *viz.*, Exhibits A-1, A-2 and A-31. An appraisal of the transactions covered by these three documents goes to show that on account of the special location of those properties the sales have been effected at fancy rates and that those rates cannot reflect the prevailing market price of lands in and around the suit site when the plaintiff parted with possession of her land. The learned Subordinate Judge was, therefore, justified in declining to place reliance on the documents relied on by the plaintiff to arrive at the value of compensation awardable to the plaintiff. The defendants have, in their turn, filed another sale deed, Exhibit B-1, which relates to the sale of a house-site in the same street where the suit property is situate. Deducting a sum of Rs. 300 for the basement existing on the land, the learned Subordinate Judge has construed Exhibit B-1 to reflect a sale transaction of 2,914 sq. ft. for a sum of Rs. 700 . Mr. P. Balasubramaniam, learned Counsel for the plaintiff, contends that the learned Subordinate Judge has failed to take into consideration a sum of Rs. 750 which had been spent by the vendee under Exhibit B-1 to level the site and that as such, the cost of the site conveyed under Exhibit B-1 must be valued at Rs. 700 plus Rs. 750, *i.e.* Rs. 1,450. D.W. 1, who is the vendee under Exhibit B-1 has, stated that he bought the property for Rs. 1,000, that he valued the basement and the wall on the site at Rs. 300, that after purchasing the site he levelled it with about 600 cartloads of earth and that one cartload of earth would cost Rs. 1-4-0. As such, the sale deed on which the defendants placed reliance to determine the value of compensation for the suit site makes it appear that the site measuring 2,914 sq. ft. had cost its vendee Rs. 1,450 (Rs. 700 + Rs. 750), which works out to nearly 50 paise per square foot. Therefore, the premise of the learned Subordinate Judge that the site purchased under Exhibit B-1 cost only 22 paise per square foot is wrong and unsustainable. Taking into consideration the fact that a portion of the suit site is near the *oorani* and therefore vulnerable for water-logging during rainy season we are of opinion that the plaintiff cannot be granted compensation for the suit site at the rate of 50 paise per square foot. On a consideration of the report of the Commissioner about the location of the suit site, we are of opinion that a compen-

sation at the rate of 40 paise per square foot would be a just and reasonable compensation to be awarded to the plaintiff. We therefore revise the compensation of Rs. 3,633 granted to the plaintiff by the trial Court to a sum of Rs. 5,813-60 at the rate of 40 paise per sq. ft. Consequently, the interest which the trial Court has awarded to the plaintiff at the rate of 6 per cent. per annum from the date of demand under Exhibit A-34 will also stand revised. The plaintiff will be entitled to interest on the amount of compensation awarded till the date of realisation and proportionate costs in the suit. To the extent the compensation amount is revised, the memorandum of cross-objections will stand allowed.

17. In the result, both the appeals will stand dismissed without costs. The memorandum of cross-objections will stand partly allowed with proportionate costs.

S.J. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Natarajan, JJ.*

Surendra Overseas Limited, owners of A.P.J. Lines .. *Appellant**

v.

Union of India represented by the Regional Director (Food), Southern Region, Madras .. *Respondent.*

Carriers—Carriage by sea—Unloading at port of destination—Short delivery of cargo at port—Damage to goods—Liability for damage—Who is responsible, carrier or consignee—Hatch report—Its value—Delivery to Port Trust—Effect—Charter party—Construction.

A hatch survey held by a vessel or its agents or officers without notice to or information given to the consignee of goods is a self-serving activity the result of which cannot prejudice the party. [*Para.* 5.]

Unless there is connection between the labour force engaged for the purpose of discharging the cargo and the consignee, it would be unreasonable to hold that the consignee should be in any manner made responsible for the alleged negligence of such labour force. [*Para.* 5.]

Delivery of the consignment to the Port Trust is not delivery to the consignee. The Port Trust takes such delivery only on behalf of the vessel. [*Para.* 7.]

Whether there has been a complete delivery or a partial delivery or delivery of goods which are partly damaged and partly in accordance with the invoice must be considered with reference to the point of time when the receiver took delivery of goods from the Port Trust. It is this delivery which is relevant for the purpose of assessment of the reciprocal obligations and rights of either party under the charter-party. [*Para.* 7.]

Case referred to :—

The Trustees of the Port of Madras by its Chairman v. *K. P. V. Sheik Mohamed Rowther and Company and others*, (1963) 2 S.C.R. (Supp.) 915.

Appeal against the decree of the City Civil Court, (IX Assistant Judge) Madras in Original Suit No.3323 of 1964, dated 16th August, 1967.

M/s. King and Partridge, for Appellant.

The Central Government Senior Standing Counsel, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The Chief Controller of Chartering, Government of India, chartered the vessel "A.P.J. Aruna", owned by the defendants, and entered into a charter party on 16th August, 1963 under Exhibit B-1. The charter was intended for the carriage of certain consignments of urea together with a certain quantity of empty gunny bags from Venice/Porto Merghera to a Port in West Coast or East Coast in India. The bills of lading evidencing the loading of the cargo are Exhibits A-1 and A-2, which in turn incorporated the material terms contained in the charter party. Exhibits A-10 and A-11 are the certificates of weight issued at the port of shipment, whilst Exhibits A-12 and A-13 are the certificates

* Appeal No. 330 of 1968.

8th *January*, 1974

of origin relating to the goods. Exhibit A-14 is the invoice issued by the seller. The invoice discloses the shipment of two consignments of urea, in all, 1,31,140 bags, for carriage to Madras and also 1312 empty bags along with it. Exhibit A-15 is the certificate of inspection given by the High Commissioner of India at the port of shipment. The ship arrived at Madras on 10th October, 1963 and commenced discharging of the cargo on 11th October, 1963 and completed the same on 14th October, 1963. The plaintiff's case is that out of the consignment of urea so loaded and as evidenced by the invoice as above, there was a short-landing of 370 bags of urea content. The vessel also discharged 1340 bags of urea slack or torn or cut and 130 bags of ship sweepings. It appears that the ship's manifest under Exhibits B-2 and B-3, also noticed such a situation. At or about the time of discharge, there was what is known as hatch survey, but without notice to the plaintiff. This is seen from Exhibit B-5. This hatch survey was undertaken by the vessel on its own responsibility when it was laying in No. 2 West Quay, Madras Harbour. It is common ground that this survey was not undertaken in the presence of the plaintiff or any one on their behalf. On the basis of the said hatch survey, the Master of the ship issued what is known as the Master's certificate of discharge of the cargo under Exhibit B-11. As per the custom prevailing at the Port of Madras, the cargo which was so discharged and hatch-surveyed, was handed over to the Port Trust authorities, who took delivery of the same from the Quay, apparently as the agents of the ship. Till this stage, it is common ground that there was no physical delivery of the cargo to the plaintiff as the consignee. After the Port Trust so took delivery of the cargo, as is usual, the plaintiff under Exhibit B-4 requested their clearing agents, the South India Corporation Agencies Private Limited, to effect clearance after getting the usual certificate from the Port Trust authorities. The Port Trust under Exhibit A-3 gave what is popularly known as the B certificate, which is a short-landing certificate, after making due enquiries as regards the quantum of the discharged cargo. Under Exhibit A-3 the short-landing of 370 bags as claimed by the plaintiff and also 1340 urea slack or torn or cut bags and 130 bags of ship sweepings were noticed. At this stage, it is proper to note that the short-landing as disclosed in the B certificate was corroborated by the ship 's outturn statement, Exhibit A-32. That also discloses the short-landing of the abovesaid 370 bags of urea etc. Even the tally sheets Exhibit A-44 of the Port Trust authorities, who effected the discharge, would also confirm such shortage. As a matter of fact, a survey at the instance of the plaintiff consequent upon the issue of the short-landing certificate under Exhibit A-3 was held on 17th and 18th of October, 1963 and from Exhibit A-4 which is the certificate which followed such survey it is seen that 1340 bags of urea were slack and torn and their weight was lesser than the invoice weight and that there were ship sweepings of 130 bags which were also naturally lesser in weight than the avowed quantity as per the invoice. This is besides the shortage of 370 bags of urea as already noted.

2. It was in these circumstances that the plaintiff came to Court seeking for the value of the goods so short-landed as also for the value of the goods damaged. The defendants in their written statement relied upon the charter party and in particular clause 4 therein, and pleaded that the cargo was duly delivered to the consignee as soon as it was discharged at the West Quay, that delivery of the goods to the Port Trust would imply delivery to the consignee and that, in view of the hatch survey held in the presence of the Master as evidenced by Exhibits B-1 and B-11, they were not in any way responsible either for the shortage or the damage to the cargo. One other contention was raised by the defendants. They would attribute the damage to the cargo to the faulty and negligent stevedoring by the persons engaged by the plaintiff in the course of the discharge of the cargo from the vessel. Lastly they would state that they had performed their part of the contract of affreightment and they were therefore absolved from liability.

3. The learned City Civil Judge framed the following issues for trial:

1. Whether the alleged short delivery of 370 bags of urea is true ?

2. Whether the alleged shortage of 7,088 Metric Tons of urea is true ?

3. Whether the entire cargo was landed as contended by the defendants ?

4. Whether the defendants are liable to compensate for the shortage under the contract of carriage ?

5. Whether the defendants or the agents were negligent in taking care of the cargo as alleged ?

6. Whether the suit is bad for want of notice from the plaintiff within 3 days from the date of removal of the goods ?

7. To what damages, if any, is the plaintiff entitled ?

8. To what relief if any, is the plaintiff entitled ?

On issues 1 to 8, after considering the documentary evidence, he came to the conclusion that Exhibit A-3, the short landing certificate issued by the Port Trust which was corroborated duly by its own outturn statement as also the tally sheets under Exhibits A-32 ,42, 43 and 44, were proof enough to accept the plaintiff's claim as to short-landing and damages. He also negatived the defendant's plea that there was negligence on the part of the plaintiff or their representatives, when the cargo was di charged from the hatches, as according to him, the labour engaged at or about the time when the cargo was discharged at the West Quay was labour provided by the Madras Dock Labour Board and the plaintiff was not in any way responsible for any alleged mishandling of the cargo by the labour force so provided and the plaintiff had no control over such labour when the discharge was made of the cargo from the hatches. In the result, he decreed the suit. The defendants have come up in appeal.

4. The main contention of Mr. Duleep Singh, the learned Counsel for the appellants is that Exhibits B-1, B-5 and B-11 are primary documents, which disclose a normal discharge of the cargo, and that in any event, under Exhibit B-1 it should be deemed that the delivery of the cargo was to the consignee when it was discharged at the West Quay, though physically it was handed over to the Port Trust authorities. In the main, his contention is that the delivery of the cargo to the Port Trust should be deemed and accepted to be delivery to the consignee, and, if so accepted, Exhibit B-1 and in particular clause 4 therein, exonerates the defendants from all supervening liability either in the matter of the shortage of the goods, or in respect of the damage to them in the course of the implementation or working out of the contract of affreightment.

5. We may at once refer to clause 4 of the charter party Exhibit B-1, which runs as follows :

> " A declaration by the Master or Chief Officer that all cargo shipped has been delivered to the receivers shall be, and shall be accepted, as, conclusive evidence of that fact, unless the receivers shall before the commencement of the discharge give to the Master notice in writing of their intention to tally the cargo, and unless such tally is in fact taken at vessel's hatchways..... ".

Strong reliance is placed upon the text of this clause by the learned Counsel for the appellant. He also relies upon the hatch-survey held at the instance of the Master of the vessel, who ultimately gave Exhibit B-11 his certificate of discharge. But it ought not to be forgotten that the said hatch-survey was held by the vessel or its agent or officers without notice to the plaintiff. This is a self-serving activity the result of which cannot prejudice the party who has neither been called to be present at the time of such survey nor has any information been given to such a person who is likely to be affected thereby. It is not the case of the appellants that any such attempt was made to invite the attention of the plaintiff to be present at the time of such survey. We are, therefore, of the view that Exhibit B-5 ,which is the report on such a hatch survey, is a self-serving document, which cannot be projected by the appellants to serve their own case. Regarding the certificate issued by the Master, it is neither corroborated by the ship's manifest or the tally sheets. As a matter of fact, the manifest as well as the tally sheets do support the short-landing certificate issued by the Port Trust after due survey in the presence of the vessel's representa-

tives. Exhibit A-4 is the survey report and Exhibit A-3 is the short-landing certificate issued by the Port Trust authorities. This is a certificate issued by a public body which obviously takes care of the cargo discharged from various ships coming from international borders. Nothing has been said as against Exhibit A-3, nor any averment made either in the trial Court or before us against the method adopted by the surveyors when they effected the survey. Reading the documents Exhibits A-2 and B-3 which are the ship's manifest and comparing the same with Exhibit A-3 which is the short-landing certificate, the position is clear that the entire cargo has not been landed. That there has been short-landing cannot be disputed as it was physically established at the time of the survey under Exhibit A-4. The only document put as against Exhibit A-3 is Exhibit B-5 read with Exhibit B-11, the certificate of the Master. We have already characterised Exhibits B-5 and B-11 as self-serving documents. Exhibits A-3, B-2 and B-3 stand alone by themselves as documents on which reliance could be placed by a Court of law to accept that there was a short-landing of cargo and that the cargo was also equally damaged as indicated in Exhibit A-4. In fact, Mr. Duleep Singh did not seriously contend that there was no such short-landing or damage to the cargo, in view of the abundance of documentary evidence with which he was confronted. He would however hesitantly contend that as the discharge was by labour force which negligently handled the cargo when it was lifted from the hatches at West Quay, the ship was not responsible for the same. There is a fallacy in this argument. The Master is responsible vicariously for the acts of his servants provided there is an admitted relationship of master and servant as between them, or by necessary implication such a jural relationship is inferable from the circumstances of the case. In the instant case, there is evidence to show that the labour force deployed for the discharge of the cargo from the ship was a force over which the plaintiff had no control. As a matter of fact, it was supplied by an independent quasi-statutory body, namely, the Madras Dock Labour Board. It may be that the labour so supplied by the Dock Labour Board used hooks while discharging the cargo from the vessel and consequently there was damage to it. The vessel ought to have taken the necessary precautions to prevent such handling at the time when such an attempt was made by the labour force engaged to discharge the cargo in an alleged negligent way. There is no evidence to support the contention that the labour force did act negligently and even if they did there was an initial objection by the vessel, or its officers at the time of discharge that such a method of discharge ought not to be adopted by the labour force engaged and that they should be more careful in the matter of the removal of the cargo from the hatches. In the absence of any such evidence, we are inclined to accept the finding of the Court below that the use of the hooks by the labour engaged by the Madras Dock Labour Board in discharging the cargo from the vessel cannot be said to be act done by the persons engaged by the plaintiff. Unless there is a connection between the labour force engaged for the purpose of discharging the cargo and the plaintiff, it is unreasonable to hold that the plaintiff should be in any manner made responsible for the alleged negligence of such labour force.

6. The last contention of the learned Counsel for the appellants, however, turns on the interpretation of clause 4 of Exhibit B-1. We have already excerpted this clause. The contention of the learned Counsel for the appellants in that in the circumstances the discharge of the cargo at the West Quay on the date when it was cleared from the vessel from its hatches and delivered to the Port Trust authorities, should be deemed for all purposes to be delivery to the receiver, or the consignee, who is the Regional Director (Food) Southern Region, Madras. That factually there was no such delivery to the representative of the plaintiff at Madras cannot be disputed. The argument proceeds that once it is not in dispute that the cargo has been discharged at Madras and the Port Trust authorities took delivery of the said cargo in full or in part, or in a damaged condition, from the vessel, then *eo instanti*, clause 4 of Exhibit B-1 would come into operation and would prevent any *lis* on the part of the receivers

to further a claim for short-landing, damage etc. No doubt, under clause 4, a declaration by the Master or the Chief Officer of the vessel that all cargo shipped has been delivered to the receivers shall be and shall be accepted as conclusive evidence of that fact. In the instant case, Exhibit B-11 is one such certificate issued by the Master of the vessel that the cargo shipped has been allegedly delivered to the Madras Port Trust. On the basis of this, the interdict contained in clause 4, which would bar an action by the receivers is invoked. As we said, the argument is fallacious because the assumption that the cargo has been delivered to the receivers is by itself not well-founded. Admittedly the cargo was delivered to the Madras Port Trust. This is the practice in the Port at Madras.

7. Whether delivery to the Port Trust authorities would constitute delivery to the consignee, has come up in several cases of this Court and the Courts have taken consistently the view that such delivery to the Port Trust is not delivery to the consignee and that the Port Trust takes such delivery on behalf of the vessel and not on behalf of the consignee. Instead of referring to the various decisions, it is sufficient to refer to the decision of the Supreme Court in *The Trustees of the Port of Madras by its Chairman* v. *K. P. V. Sheik Mohamed Rowther and Company and others*[1]. Raghubir Dayal, J., speaking for the Bench has categorically made the position clear and the opinion of the Bench is better quoted in their own words :

> " There is no doubt that the ship-owner is the bailee of the shipper, the consignor and that he is responsible for the delivery of the goods to the consignee or a transferee according to the terms of the bill of lading. This duty the ship-owner discharges only when he has delivered the goods to the consignee or such person who is entitled to take delivery in accordance with the endorsements on the bill of lading. Delivery to the Board is not delivery to the consignee or such person, both because the delivery is to be on the presentation of the bill of lading and because the Act (The Madras Port Trust Act) contains no provision which would constitute the Board an agent of the consignee for the purpose of taking delivery of the goods............It is clear therefore that when the Board takes charge of the goods from the ship-owner, the ship-owner is the bailor and the Board is the bailee, and the Board's responsibility for the goods thereafter is that of a bailee. The Board does not get the goods from the consignee. It cannot be the bailee of the consignee. It can be the agent of the consignee only if so appointed."

This is not alleged in this case either. The Supreme Court concluded by saying :

> "....the landing of the goods by the ship-owner on the quay and placing them in charge of the Board does not amount to delivering them to the consignee, even though it absolves the master of the ship from further responsibility for the loss or damage to the goods."

These above statements are clinching and a complete answer to the contention of Mr. Duleep Singh, which is based on clause 4 of Exhibit B-1. Admittedly, there is no physical delivery of the cargo to the consignee though it was discharged at the Quay. It was only the Port Trust which took delivery of the same. It was in custody of it. A survey was effected thereafter. The short-landing and the damage was discovered as a result thereof. It was at that stage that the receiver or the consignee came into the picture and took delivery of the cargo as offered by the Port Trust in their godowns. Therefore, it is clear that it is only then that the consignee obtained physical custody or possession of the cargo discharged by the vessel at the Quay, though it was handed over as per the practice to the Port Trust authorities. It is for consideration whether at that point of time when the receiver took delivery of the goods from the Port Trust, there has been a complete delivery or a partial delivery, or delivery of goods which are partly damaged and partly in accordance with the invoice. It is this delivery which comes into the computation for the purpose of assessment of the reciprocal obligations and rights of either party under the charter party. Clause 4 of Exhibit B-1 cannot therefore

1. (1963) 2 S.C.R. (Supp.) 915.

help the appellants. When the plaintiff received the cargo after the survey under Exhibit A-1 it was discovered that there was a short-landing and damage to the goods. This is supported by Exhibit A-3 the short-landing certificate issued by the Port Trust authorities and corroborated as well by the ships manifest and the tally sheets already referred to. We have, therefore, no hesitation in accepting the case of the plaintiff that there was a short-landing and damage to the cargo as complained. Such short-landing and damage have been proved by acceptable evidence. The Court below was right in awarding damages being the money equivalent to such short-landed cargo and damaged cargo. In so far as the quantum of the damages awarded by the Court below is concerned, there is no dispute.

8. The appeal therefore fails and it is dismissed with costs.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam, J.*

State of Madras through the District Collector, Tirunelveli and another .. *Petitioners**

v.

A.K. Vetham Pillai .. *Respondent.*

Civil Procedure Code (V of 1908), section 80—Suit for injunction—Suit against the State—Notice under section 80—Whether necessary.

Every suit, including a suit for injunction will have some reference to a past state of right, claim on denial as between the public authority and the concerned party and hence will come within the ambit of the phraseology of section 80, Civil Procedure Code. [*Para.* 3.]

Cases referred to :—

Arunachalam Chetty v. *David*, (1931) 34 L.W. 993 ; *Bhagchand Dagadusa* v. *Secretary of State for India*, (1927) 54 I.A. 338 : 53 M.L.J. 81 : 26 L.W. 809 : A.I.R. 1927 P.C. 176 ; *Sawai Singhai* v. *Union of India*, (1966) 1 S.C.R. 986 : (1967) 1 S.C.J. 267 : A.I.R. 1966 S.C. 1068 ; *State of Madras* v. *Ramalinga Reddiar*, (1967) 2 M.L.J. 131 ; *Arunachalam Chetty* v. *David*, I.L.R. (1927) 50 Mad. 339 ; *Krishnaswami Sastri* v. *Syed Ahmed*, (1931) 34 L.W. 993.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Tuticorin, dated 25th January, 1971 and made in I.A. No. 1706 of 1970 in O.S. No. 60 of 1968.

N. Thiagarajan, for Additional Government Pleader, for Petitioner.

R. Krishnamachari, for Respondent.

The Court made the following

ORDER.—The only question that arises in this revision is as to whether the suit filed by the plaintiff in a representative capacity on behalf of the entire ayacutdars of one Palakulam tank in Tirunelveli district for an injunction is bad for want of proper notice under section 80, Civil Procedure Code. The Court below has held that suit being one for an injunction does not require a notice under section 80, Civil Procedure Code, and that therefore, the suit is maintainable.

2. In this revision, it is contended on behalf of the State of Madras, that the suit which has been filed in this case before the expiry of 60 days from the date of issue of notice under section 80 is bad and therefore is not maintainable. The plaintiff sought an injunction in the suit restraining the State of Madras from closing a weir in Periakulam tank through which the ayacutdars received their supply of water to their tank. They issued a notice under section 80, Civil Procedure Code, on 27th January, 1968, but they filed the suit on 1st February, 1968, before the expiry of the 60 days period referred to in that section. The question is whether the suit filed before the expiry of the 60 days referred to in the section 80 notice could be maintainable.

3. The contention that was put forward before the Court below on behalf of the plaintiff was that the suit being one for injunction, an anticipatory relief, could be maintained in view of the decisions in

*C.R.P. No. 1825 of 1973.

18th March, 1974.

Arunachalam Chetty v. *David*[1]. In the first case Ramesam and Reilly, JJ., held that the words " in respect of any act purporting to be done," in section 80, Civil Procedure Code included only a past act and have no reference to a future or contemplated act, that incomplete or threatened acts are not within the ambit of these words, and that, therefore, a suit for bare injunction seeking to restrain a public officer from doing something which he threatens to do, will not require notice under section 80, Civil Procedure Code. Curgenvan, J., in the second case not only followed the above view, but also sought to distinguish the observation of the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State for India*[2], on the ground that the Judicial Committee cannot be taken to lay down anything more than that section 80, Civil Procedure Code, would apply to all kinds of suits, including a suit for injunction. The learned Judge held that only if a suit for an injunction was based on past acts, the notice under section 80 would be essential. In the judgment of the Judicial Committee in *Bhagchand Dagadusa* v. *Secretary of State for India*[2] Viscount Sumner explicitly stated that section 80 was express and mandatory and admitted of no implications or exceptions, that it imposed a statutory and unqualified obligation upon the Court, and that to read any qualification into it is an encroachment of the function of the Legislature. Later the Supreme Court in *Sawai Singhai* v. *Union of India*[3], also considered this question. In that case it was contended on behalf of the State that the suit did not require notice because on the particular facts it was advantageous for the State to raise such a plea, and the Supreme Court held that the observations of Viscount Sumner in the above case applied with equal force to the suit and that section 80, Civil Procedure Code, applies to all suits whether it related to past acts or future acts, of a State or Public Officer. In a recent decision a Division Bench of this Court in *State of Madras* v. *Ramalinga Reddiar*[4], held that the earlier view that the words 'in respect of any act purporting to be done', in section 80, Civil Procedure Code, include only a past act and have no reference to a future act or contemplated act and that therefore a suit for a bare injunction will not require a notice under that section cannot be sustained. The Bench pointed out that " we are unable to conceive of a suit even for an injunction *simpliciter* against any public officer, which does not have reference to some action in the past, upon which that authority has based it, maybe a claim of right, or a notice, or a threat to do something, within what that authority regards as the scope of its power. After all, there cannot be a suit for an injunction based on a future apprehension, pure and simple, and suspended in the air, so to speak, without a foundation of something that had already occurred or had already been claimed, asserted or denied. Once this is made evident, it will be clear that every suit, including a suit for injunction will have some reference to a past state of right, claim or denial, as between the public authority and the concerned party and hence will come within the ambit of the phraseology of section 80, Civil Procedure Code. The decisions of the Supreme Court above referred to as well as the recent Bench decision of this Court have not been cited before the Court below. In these decisions, the earlier decisions in *Arunachalam Chetty* v. *David*[1], and in *Krishnaswami Sastri* v. *Syed Ahmed*[2], which have been relied on by the Court below have been considered and dissented from. The order of the lower Court has, therefore, to be set aside and the suit filed in this case before the expiry of two months period from the issue of section 80 notice is bad and cannot be maintained. The order of the lower Court is therefore set aside and the suit will stand dismissed as not maintainable. This will not, of course, prevent the plaintiff from filing a separate suit on the same cause of action. The revision petition is allowed. There will be no order as to costs.

S.J. ——— *Petition allowed.*

1. (1931) 34 L.W. 993.
2. (1927) 54 I.A. 338: 53 M.L.J. 81: 26 L.W. 809: A.I.R. 1927 P.C. 176.
3. (1966) 1 S.C.R. 986: (1967) 1 S.C.J. 267: A.I.R. 1966 S.C. 1068.
4. (1967) 2 M.L.J. 131.

1. (1927) I.L.R. 50 Mad. 339.
2. (1931) 34 L.W. 993.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*M.M. Ismail, J.*

Sri Kanchi Kamakoti Sankaracharia Swamigal Mutt represented by Sri M.V. Krishnamurthy, Sri Karyam and Agent .. *Petitioner**

v.

Secretary, Revenue Department, Government of Tamil Nadu and others .. *Respondents.*

Tamil Nadu Travelling Allowance Rules framed under section 116 (2) (xxiii) *of the Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of* 1959)—*Rule* 14—*Meaning of the words " this rule " in proviso to section* 14 (1)—*Construction—Rule* 14 *inapplicable to servants of Mutts.*

The Tamil Nadu Travelling Allowance Rules framed under section 116 (2)(*xxiii*) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, contain the clearest evidence in the Rules themselves that the rule-making authority intended to make a distinction between a rule and a sub-rule and whenever the authority meant to refer to a rule it used the expression ' rule ' and whenever it meant to refer to a sub-rule it used the expression 'sub-rule '. Hence the expression ' this rule' occurring in the proviso to rule 14(1) is intended to take in the entirety of rule 14 and not sub-rule (1) alone. The mere fact that the proviso was placed after the main part of sub-rule (1) and was not enacted as an independent provision or sub-rule or placed after all the sub-rules does not alter the position. Therefore rule 14 including sub-rule (2) also has no application to the servants of Mutts. [*Para.* 3.]

Petition under Article 226 of the Constitution of India praying that in the circumstances, stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the 3rd respondent contained in M.M. No. 15775 of 1966 dated 21st December, 1967 re: audit objections-Fasli 1375--3rd quarter 1st January, 1966 to 31st March, 1966, re: applicability of T.A. Rules to employees of the petitioner Mutt confirming the order of the 2nd respondent in R.P.No. 91 of 1969 on his file, which was confirmed by the 1st respondent in G.O.R.T. No. 1149, Revenue Department, dated 28th June, 1971, and quash the said orders and made therein.

N. Venkatarama Iyer, for Petitioner.

S. Ramalingam, Assistant Government Pleader, for Respondents.

The Court made the following

ORDER.—The petitioner in this writ petition prays for the issue of a writ of *certiorari* to quash the order dated 21st December, 1967 of the third respondent, as confirmed by the second respondent and the first respondent. The petitioner is Sri Kanchi Kamakoti Sankaracharia Swamigal Mutt represented by Sri Karyam and Agent. In the Audit Notes of the Mutt relating to the period from 1st January, 1966 to 31st March, 1966, the Assistant Examiner of Temple Accounts pointed out that the Manager of the Mutt had drawn travelling allowance in excess of the amount admissible under the Tamil Nadu Travelling Allowance Rules. In reply to this audit objection, the agent of the Mutt by his reply dated 10th November, 1967 stated that the rules framed under section 116 (2) (*xxiii*) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter called the Act) were not applicable to the servants of the Mutt. The third respondent *viz.*, the Deputy Commissioner, Hindu Religious and Charitable Endowments, by his reference dated 21st December, 1967 directed the recovery of the amount paid in excess of the amount payable as per the Travelling Allowance Rules. The petitioner, thereupon, requested the third respondent to revise his order in view of the fact that sections 56 and 57 of the Act which related to the service conditions of servants of religious institutions were not applicable to the Mutts. The third respondent informed the petitioner on 25th June, 1969 that the Travelling Allowance Rules were framed under section 116 (2) (*xxiii*) of the Act and not under section 56 of the Act and as such

* W.P. No. 612 of 1972. 27th November, 1973.

rule 14 (2) of the Rules framed under section 116 (2) (*xxiii*) is applicable to the servants of the Mutt also. The petitioner filed a revision petition to the Commissioner, Hindu Religious and Charitable Endowments, the second respondent herein who dismissed the same on 15th November, 1969. The petitioner preferred a further revision petition to the Government and the Government dismissed the same in G. O. Rt. No. 1149, Revenue dated 28th June, 1971. It is to quash these orders the present writ petition has been filed.

2. The Government have framed rules called the Tamil Nadu Hindu Religious Institutions (Officers and Servants) Rules, 1964 (hereinafter called the Rules) in exercise of the powers conferred by section 116 (2) (*xxiii*) of the Act. Rule 14 of the Rules is as follows :—

> 14. "*Pay and emoluments of officers and servants*:—(1) The pay and emoluments in cash and in kind, of each officer or servant shall be in accordance with a schedule of establishment framed by the trustee or trustees, and approved by the Assistant Commissioner in the case of institutions under the jurisdiction of the Assistant Commissioner and by the Deputy Commissioner in the case of other institutions. The trustee or trustees shall not alter the Schedule without the previous permission of the Assistant Commissioner or the Deputy Commissioner, as the case may be :
>
> Provided that this rule shall not apply to maths and specific endowments attached to maths.
>
> (2) Travelling allowance and daily allowance payable for the journeys performed by the officers and servants shall be in accordance with the Tamil Nadu Travelling Allowance Rules for the time being in force. The Executive Officer, and in the absence of any such officer, the trustee or the Chairman of the Board of Trustees, as the case may be, shall be the controlling and countersigning authority in respect of their travelling allowance bills.
>
> (3) Advance of pay shall not be paid to any officer and servant except with the previous permission of the Assistant Commissioner or the Deputy Commissioner, as the case may be."

It is common case that sub-rule (2) of rule 14 alone deals with the travelling allowance and that requires that the travelling allowance and daily allowance payable for the journey performed be the officers and servants shall be in accordance with the Tamil Nadu Travelling Allowance Rules for the time being in force. The question for consideration is whether rule 14 (2) of the Rules applies to the petitioner Mutt or not. Mr. Venkatarama Ayyar, the learned Counsel for the petitioner contends that rule 14 (2) of the Rules does not apply to the servants of the Mutt because of the peculiar position and status and privileges enjoyed by the Madathipathis and recognised by the Act itself. As against this, the learned Assistant Government Pleader contends that the said rule is in general terms and applies to the Mutts also.

3. For one very good reason, I am of the opinion that the entire rule 14 of the Rules has no application to Mutts. I have already extracted all the three sub-rules of rule 14 of the Rules. There is a proviso added to sub-rule (1) which also has been extracted. According to the proviso 'this rule' shall not apply to maths and specific endowments attached to maths. The sole question for consideration is when the proviso used the expression 'this rule' did it comprehend only sub-rule (1) or did it comprehend the entire rule 14 of the Rules. I am of the opinion that the expression 'this rule' occurring in the proviso to sub-rule (1) of rule 14 refers to the entirety of rule 14 and not to sub-rule (1) alone. I am reaching this conclusion by virtue of the fact that the Rules make a distinction between a 'rule' and a 'sub-rule' and it refers to sub-rule whenever a sub-rule is indicated and it refers to rule whenever the entirety of the rule is indicated. For instance, rule 15 of the Rules deals with the leave that will be admissible to the servants of the religious institutions. Sub-rule (6) of this rule 15 says ,'leave may be granted, under this rule, to the hereditary and non-hereditary Ulthurai servants on their providing proper substi-

tutes to the satisfaction of the appointing authority." Thus, it will be seen the reference to 'this rule' occurring in sub-rule 6 of rule 15 refers to the rule 15 as such and not to any particular sub-rule of rule 15. Similarly, rule 24 of the Rules deals with investment of security furnished. Sub-rule (1) of this rule states : "The cash security furnished by an officer or servant shall be invested as early as possible in any one of the approved forms of securities, with the consent of the officer or servant, and the interest earned by such security shall be paid to him." There is sub-rule (2) to this rule 24 and that sub-rule states : "No interest shall be payable on the security amount till it is invested in the manner indicated in sub-rule (1)." Therefore, there is the clearest evidence in the rules themselves that the rule-making authority intended to make a distinction between a rule and a sub-rule and whenever the authority meant to refer to a rule, it used the expression 'rule' and whenever it meant to refer to a sub-rule, it used the expression 'sub-rule.' I am unable to hold that the expressions rule and sub-rule had been indiscriminately used in these rules. Therefore, in this background, I am clearly of the opinion that the expression 'this rule' occurring in the proviso to sub-rule (1) to rule 14 was intended to take in the entirety of the rule 14 and not sub-rule (1) alone. The mere fact that the proviso was placed after the main part of sub-rule (1) and was not enacted as an independent provision or sub-rule or it was not placed after all the three sub-rules, does not make any difference in this context or alter the position. In view of this conclusion of mine, it follows that the entirety of rule 14 of the Rules which obviously includes sub-rule (2) also, has no application to the servants of Mutts and therefore the action of the respondents herein based on sub-rule (2) of rule 14 of the Rules cannot be sustained. On this short ground, the writ petition is allowed and the impugned orders are quashed. There will be no order as to costs.

P.S.P. — *Writ petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao* and *S. Natarajan, JJ.*

Sri Chamundi Theatre, Mysore Talkies Limited, Podanur .. *Appellant**

v.

S. Chandrasekhara Rao .. *Respondent.*

Companies Act (I of 1956), *section* 450 (3) *—Company—Suit, on mortgage—Provisional liquidator appointed—Managing agent executing mortgage deed—Validity—Powers of provisional liquidator.*

Appointment of a person as provisional liquidator does not mean that the managing agent's right to deal with and the right to retain possession of the properties of the company in its custody is automatically taken away as there is no vesting of the properties in the provisional liquidator, *eo instanti* he is appointed in a pending application for winding up. Whatever may be said of the official liquidator after an order for winding up is made and which is also circumscribed by the various and strict provisions under the Companies Act, these do not apply, as a matter of course, to the office of the provisional liquidator. The latter is always controlled by the instrument which appoints him and he is equated just for technical purposes with the official liquidator. He is an officer of Court who has to take directions of Court in the matter of exercise of his powers attached to his office and he cannot assume the role of an official liquidator and invoke the provisions of the Companies Act and Rules made thereunder and claim that he is a receiver and in physical, juridical and sole custody and control of the properties of the company and that no one can interfere with such alleged possession of his and create instruments such as mortgages to his prejudice and to the prejudice of the company.

[*Para.* 8.]

* Appeal No. 332 of 1968. *8th January,* 1974.

Cases referred to :—

Employees Liability Assurance Corporation v. *Sedgwick Collins and Company*, (1927) A.C 95; In re *Oriental Inland Steam Company* Ex parte, *Scide Rly. Company*, (1873) 9 Ch. D. 557.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, and passed in Original Suit No. 79 of 1965.

S. Nainarsundaram, for Appellant.

K. Parasurama Iyer and *N. Balasubramanian*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—This appeal is directed against the judgment of the learned Subordinate Judge, Coimbatore. The defendant is the appellant. On 10th January, 1959 one G. P. Raju Mudaliar, as a partner of a managing agency firm to the defendant incorporated company, executed a simple mortgage for Rs. 10,000 in favour of the plaintiff and mortgaged the immovable properties and all the other properties belonging to the company. The consideration as recited in the deed of mortgage Exhibit A-1, was that it was to pay for two money decrees obtained against the defendant company by the plaintiff as proprietor of a concern known as " Standard Commercial Corporation, Coimbatore." In order to avoid execution of the decree so obtained by the plaintiff, the managing agents executed the above mortgage and according to them, averted further proceedings in execution of the money decrees. After the said mortgage was executed no moneys were paid thereunder. The plaintiff unsuccessfully made a demand under Exhibit A-9 for the repayment of the amount and thereafter, instituted the action. The defendant company denied liability under the mortgage and put the plaintiff to strict proof of the execution of the same. Their second contention was that G. P. Raju Mudaliar did not have the competence to execute the same and therefore, it is not binding on the company. In support of this contention , it was alleged that on the date when the mortgage was executed, one Mallikarjuna Iyer was in custody and control of all the properties of the Company as "provisional liquidator" appointed by the High Court, Madras in O. P. No. 82 of 1956. Since the provisional liquidator was so functioning on the date when the mortgage was executed in favour of the plaintiff, the mortgage deed is assailed on the ground that it does not bind the company. It was also sought to be made out that there was no resolution by the Board of Directors of the company which authorised G. P. Raju Mudaliar to execute the said mortgage. The learned Subordinate Judge after discussing the factual and legal contentions came to the conclusion that Raju Mudaliar had competence to execute the said mortgage and that the mortgage was true and valid in the sense that it was supported by consideration. The Court also noticed Exhibit A-7 which was a letter written by the Counsel for the defendant in a contemporary proceeding filed by the Syrian Bank, Coimbatore against the defendant company in and by which the defendant stated that he was not disputing the suit mortgage. The learned judge was inclined to accept the argument that after having stated so in Exhibit A-7, it is no longer, open to the defendant to contest either the competence of G. P. Raju Mudaliar to execute the mortgage or the validity or truthfulness of the mortgage in other respects. The lower Court also found that there was a valid notice convening the general body meeting and that Raju Mudaliar, as Managing Agent of the company, did execute the mortgage deed in conformity with the provisions of the Act and in pursuance of the resolution passed in the said meeting. In the result, a preliminary decree was passed as prayed for by the plaintiff. It is as against this the present appeal has been filed.

2. Mr. Nainarsundaram, the learned Counsel for the incorporated company does not seriously contend that the mortgage is not supported by consideration. As a matter of fact, he would fairly concede that the resolutions disclosed that the mortgage was to avert the execution of money decrees obtained by the plaintiff

as against the company and in this sense, Exhibit A-1 is not assailable as not being true or binding on the company. But the sheet-anchor of his contention is that on 10th January, 1959 when the managing agents, represented by G. P. Raju Mudaliar executed this mortgage, there was a provisional liquidator functioning under the orders of Court and that the managing agents not having secured possession of the properties from the provisional liquidator on the date when the mortgage was effected and as the matter should be deemed to be still *lis pendens* on that date or that the properties of the company were in *custodia legis*, it is sought that Exhibit A-1 was not competently executed by the managing agents and therefore, not a valid and enforceable instrument in the eye of law.

3. To appreciate this contention, it is necessary to refer to a few relevant facts which happened during the pendency of the application for winding up filed by a creditor against the company. One Kalappa Chettiar filed an application, O.P. No. 82 of 1956, on the file of this Court praying that the company may be wound up for the reasons stated by him in his petition and contemporaneously in an application No. 774 of 1955, sought for the appointment of a provisional liquidator pending disposal of the main application for winding-up. Balakrishna Iyer, J., dealing with the said application, ordered that Mr. M. Mallikarjuna Iyer, Advocate, Coimbatore, be appointed the provisional liquidator of the company and that he do take possession of, collect and protect all the properties, effects and actionable claims to which the company above named appears to be entitled to but not to distribute or part with the same until further orders of Court. This order is, dated 27th March, 1956. On 27th November, 1958, the petitioning-creditor did not press the main application for winding-up. Subramanyam, J., disposed of O.P. No. 82 of 1956 by passing the following order :

"This petition is not pressed. The provisional liquidator will convene a general meeting of the members of the company within six weeks from this date, after giving the requisite notice for the purpose of electing a Board of Directors, consisting of three Directors. Immediately, after they are elected, the directors will elect a managing director. The Provisional Liquidator will hand over charge of the company and its affairs to the Managing Director so elected The provisional Liquidator, will out of the funds of the company meet such liabilities as are incurred during his term of office, as such liquidator and will appropriate out of the funds in his hands, money due to him on account of the remuneration and otherwise. Any further sums payable to him will be paid to him by the Managing Director out of the funds of the company after he assumes charge.

The Provisional Liquidator will have liberty to apply in this petition for payment by the company in the event of such payment not being made out of Court.

Subject to these observations, this petition is dismissed."

4. The learned judge obviously, allowed the provisional liquidator to continue to be in charge of the company and its affairs until he hands over the same to the managing director to be elected in the manner stated by him in the order. Thereafter, on 2nd January, 1959, he had to modify certain portions of his earlier order in an application made by the managing agents represented by G. P. Raju Mudaliar. When it was brought to the Court's notice that there was no provision under the Articles of Association of the company for the appointment of managing director and that the managing agents alone were in sole charge and custody of the properties of the company, the learned Judge modified his earlier order thus :

"In the order passed by me on 27th November, 1958 the sentence, 'Immediately after they are elected, the directors will elect a managing director' will be deleted. In the rest of the order, the words 'Sri Raju Mudaliar and Sri Natarajan will be substituted in the place of the words, 'the managing director', wherever they occur. The following sentences will be added. Sri Viswanathan says that the firm of G. P. Raju and Company has ceased to

exist. Nothing said in this order will preclude his client from urging that contention if and when it becomes material in any proceeding."

5. By this order, it is clear that Subramanyam, J., expressed his desire that the provisional liquidator should hand over charge of the company and its affairs to G. P. Raju Mudaliar and Natarajan, the partners of the managing agents firm, in question. The learned Judge also made it clear that the modification should be incorporated in the order passed by him on 27th November, 1958. It is therefore, obvious that the direction to the provisional liquidator to hand over the properties and other assets of the company, if they were in his physical custody, to G. P. Raju Mudaliar and another, should be deemed to have been made even on 27th November, 1958. The provisional liquidator, Mr. Mallikarjuna Iyer, in this connection, filed a report and wanted further directions to hold a meeting of the shareholders. But the learned Judge by his order, dated 15th January, 1959 specifically directed that he need not hold any meeting but on the other hand, he should hand over charge of the company to the persons named in the order, dated 2nd January, 1959. On a fair reading of the orders of this Court, we are of the view that it was a direction of this Court exercising jurisdiction under the Companies Act that the provisional liquidator should hand over possession of the properties of the company including the immovable properties belonging to it, to Mr. G. P. Raju Mudaliar, and that he ought to have done it even as early as 27th November, 1958 if not by 2nd January, 1959.

6. A *resume* of the above facts indicate that on and from 27th November, 1958, and in any event, definitely after 2nd January, 1959 the provisional liquidator ceased to be in judicial control or statutory control of the custody of the properties of the company and it was the managing agents who are entitled, as a matter of right, by orders of Court and otherwise, to be in charge of the same.

7. The contention of Mr. Nainarsundaram, however, is that under section 450 (3) the powers of the provisional liquidator are equatable to the powers of an Official Liquidator and the Official Liquidator under rule 232 and rule 233 of the Companies (Court) Rules, 1959 is in the position of a Receiver. Any interference by a third party including the managing agents so as to prejudice such a right of the provisional liquidator to deal with the properties of the company in his own right as such receiver, ought to be held to be a void act or in any event, an act without competence. This argument overlooks the text of clause 3 of section 450 which says :

> "Where a provisional liquidator is appointed by the Court, the Court may limit and restrict his powers by the order appointing him or by a subsequent order ; but otherwise he shall have the same powers as a liquidator."

The foremost thing to be looked into is to see whether the Court has restricted the powers of the provisional liquidator or prescribed such powers in accordance with the circumstances of each case. In the instant case, though on 27th March, 1956 the provisional liquidator was entitled to take possession of, collect and protect all the properties and effects, etc., of the company, yet, by its order, dated 27th November, 1958 read in conjunction with the order, dated 2nd January, 1959, this Court made it clear that the Official Liquidator should hand over charge of the company and its affairs to G. P. Raju Mudaliar, a partner of the managing agency-firm. This term of appointment prevails over the general powers which a provisional liquidator might otherwise obtain under section 450 (3) of the Act. As the special always excludes the general and as the general part of the provision in clause 3 of section 450 is not invokable in the instant case, due to the special powers conferred on the provisional liquidator by orders of Court, the argument of Mr. Nainarsundaram, has been characterised by us as fallacious.

8. The next contention of Mr. Nainarsundaram, is that there is an initial vesting of the properties of the company in the liquidator on the date when the provisional liquidator is appointed, in an application for winding up and that the text of the order of appointment of the provisional liquidator also is to the same effect. It is by new well-settled that

there is some marked distinction between cases arising in insolvency and those arising under the Companies Act for winding up of companies. Under the former, when the Official Assignee or the Official Receiver is appointed as interim Receiver, even though the main application for adjudication is still pending disposal on the file of this Court, yet by reason of the provisions of law as to insolvency, there is an automatic vesting of the properties of the debtor (the proposed insolvent) in the Official Receiver or the Official Assignee as the case may be. Mr. Parasurama Iyer, the learned Counsel for the respondent, rightly, invited our attention to a decision of the Division Bench of the Travancore-Cochin High Court which, in turn, relied upon well-known rulings of English Courts on this proposition. In *Employers' Liability Assurance Corporation* v. *Sedgwick Collins & Company*[1], Viscount Cave said:

> " A company in liquidation, though the administration of its affairs has passed to the liquidator, retains its complete existence."

Sir G. Mellish, L.J., 'In re, *Oriental Inland Steam Company* Ex parte *Scide Rly. Company*[2], observed that :

> " Winding up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding up the legal estate still remains in the company."

These well-known propositions were accepted by the learned Judges of the Travancore-Cochin Court. Following these principles which are well-laid and stated, we have no hesitation in accepting the contention of the learned Counsel for the respondent that even though there was an application for winding-up pending, and even though there was a provisional liquidator appointed to look after the affairs of the company in terms of the order under which he was appointed, in the instant case, in particular, and generally in all such cases, the properties of the company cannot be said to have vested in the provisional liquidator which requires a divesting at some future point of time to enable those in charge of the affairs of the company to deal with them in a manner known to law. To be more specific, by Mr. Mallikarjuna Iyer's, appointment as provisional liquidator the managing agents right to deal with and the right to retain possession of the properties in its custody for the benefit of the company is not automatically taken away as there is no vesting of the properties in the provisional liquidator, *eo instanti* he is appointed in a pending application for winding-up. Whatever may be said of the rights of the Official Liquidator after an order for winding up is made and which is also circumscribed by the various and strict provisions under the Companies Act, these do not apply, as a matter of course, to the office of the provisional liquidator. It is always controlled by the instrument which appoints him and he is equated for technical purposes with the Official Liquidator. His office is not an equation to that of an Official Liquidator but he is an officer of Court who has to take directions of Court in the matter of exercise of his powers attached to his office and he cannot assume the role of an official liquidator and invoke the provisions of the Companies Act and the Rules made thereunder and claim that he is a Receiver and in physical, juridical and sole custody and control of the properties of the company and that no one can interfere with such alleged possession of his and create instruments such as mortgages to his prejudice and to the prejudice of the company. Here it is conspicuous to note that on 27th November, 1958 there was no application for winding up at all since it was withdrawn as not pressed by the petitioning-creditor. In those circumstances, we are of the view that on 2nd January, 1959 G. P. Raju Mudaliar, as a partner of the managing agency-firm should be deemed to be in lawful custody of the properties and affairs of the company and that the mortgage created by him as such managing agent and pursuant to the resolution of the general body on 10th January, 1959 in Exhibit A-1 is a valid instrument which is enforceable in a Court of law.

9. We have already held agreeing with the Court below that the mortgage is

1. 1927 A.C. 95.
2. (1873) 9 A. Ch. 557 at 560.

true and binding in the sense that it is supported by consideration. The decree and judgment of the Court of the learned Subordinate Judge is therefore, unassailable. The appeal, therefore, fails and it is dismissed. There will be no order as to costs.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam and N. S. Ramaswami, JJ.*

The Union Co-operative Insurance Society Limited, Madras .. *Appellant**

v.

Lazarammal Ravel and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *sections* 95 (2) (b) *prior to the amendment of* 1969 *and* 110-*D—Accident to motor vehicle—Death of victim—Claim petitions by widow and children for compensation—Award against owner and insurer—Appeal by insurer to limit liability—Memo. of cross-objections claiming higher amount—Competence—Applicability of Civil Procedure Code.*

In a claim petition for compensation in respect of death caused in accident to a motor vehicle, the Tribunal awarded a sum of Rs. 9,600 to the widow and children of the victim against the owner of the vehicle and the insurer. The insurer appealed to the High Court contending that the company cannot be made liable for the entire amount. The owner was made a *pro forma* respondent. The widow and children filed a memo. of cross-objections claiming a higher amount. Objection was taken that the memo. of cross-objections was incompetent.

Held : Under section 95 (2) (*b*) of the Motor Vehicles Act before the amendment of 1969, the maximum amount to which the insurer can be made liable in the instant case was Rs. 4,000. [*Para.* 3.]

The memorandum of cross-objections filed by the claimants was competent. Section 110-D of the Act contemplates appeal to the High Court against the order in the claim petition. When once an appeal is entertained all the Rules of the Civil Procedure Code, would be applicable to such an appeal as no other procedure is prescribed in the Act. Hence Order 41, rule 22 of the Code, would be applicable and the respondent in an appeal would be entitled to present a memo. of cross-objections.

The appeal contemplated under section 110-D of the Motor Vehicles Act was not to a special Tribunal but to the High Court. Undoubtedly all the provisions of the Civil Procedure Code, would be applicable to any proceeding before this Court even if it was an appeal under any special statute. Therefore the right to file the memo. of cross-objections would lie. [*Paras.* 4, 5, 6 *and* 7.]

Cases referred to :—

Vedantachariswami v. *Sri Muthiah Chetti*, (1955) 68 L.W. 66 ; *Secretary of State* v. *Rama Rao*, I.L.R. 39 Mad. 617 : 43 I.A. 192 : 31 M.L.J. 324 : A.I.R. 1916 P.C. 21 ; *National Sewing Thread Company, Limited* v. *James Chadwick and Brothers Limited*, (1953) 2 M.L.J. 215 : 1953 S.C.J. 509 : 1953 S.C.R. 1028 : A.I.R. 1953 S.C. 357 ; *Manjula Devi Butta* v. *Manjusri Raha*, (1968) A.C.J. 1; *W. S. Bhagsingh & Sons* v. *Omprakash Kaith*, (1971) A.C.J. 324.

Appeal and Memo. of Cross-objections against the order of the Motor Accident Claims Tribunal, Tirunelveli, dated 11th August, 1967 in C.P. No. 37 of 1966.

S. Balathandapani, for Appellant.

K. S. Desikan, K. Raman, T. Chengalvarayan, and *P. S. Somasundaram*, for Respondents.

The Order of the Court was made by

Ramaswami, J.—This appeal is filed by the second respondent in Claim Petition No. 37 of 1966 on the file of the Motor Accident Claims Tribunal, Tirunelveli. The appellant is the insurer of the vehicle which was involved in the motor accident. The claimants are the widow and children of one Lucas Hass Morais who died in the motor accident that occurred at about 2 P.M. on 1st February, 1966. The motor

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* A.A.O. No. 55 of 1969 and Memo. of Cross-objections. 30*th July*, 1973.

vehicle involved in the accident is a taxi bearing registration No MDU 8441, and owned by the first respondent to the claim petition. The claimants prayed for a total compensation of Rs. 25,000 towards loss of benefit as a result of the death of Lucas Hass Morais. The two respondents to the claim petition resisted that claim. But, ultimately the Tribunal held that the accident was a result of rash and negligent driving of the motor vehicle, that the claimants are entitled to compensation, and fixed the quantum of compensation at Rs. 9,600. It has passed an award for such sum against the owner of the vehicle as well as the insurer. The Insurance Company has preferred this appeal and the only contention raised before us is that as per section 95 (2) (*b*) of the Motor Vehicles Act as it stood prior to 1969 amendment, the maximum amount to which the insurer can be made liable, in this case, is only Rs. 4,000. The contention is that the insurance company cannot be asked to pay the entire sum of Rs. 9,600 awarded as the compensation.

2. The claimants had not preferred any independent appeal claiming enhancement of compensation fixed by the Tribunal. But they have filed a cross-objection to the appeal filed by the Insurance Company in which they have claimed enhancement of compensation against the Insurance Company as well as the owner of the vehicle. It may be noted that the owner of the vehicle who was the first respondent in the claim petition has been impleaded as *pro forma* respondent in the appeal preferred by the Insurance Company. Now, in the cross-objection, the prayer is for enhancement of compensation not only against the insurance company, who is the appellant, but also against the owner of the vehicle, who is one of the respondents to the appeal.

3. There can be no doubt that the appeal of the Insurance Company has to be allowed. Section 95 (2) (*b*) as it stood prior to 1969 amendment provided that the maximum liability of an insurance company in respect of a vehicle which carries passengers is limited to Rs. 20,000 in respect of all passengers who travelled in the vehicle and there is the further restriction that in respect of an individual passenger, the maximum liability of the Insurance Company is Rs. 4,000 in the case of a vehicle carrying six or less passengers and Rs. 2,000 in the case of a vehicle carrying more than six passengers. The vehicle which is a taxi was to carry less than six passengers, and as per the said provision, the maximum liability, regarding the death of one of the passengers on the Insurance Company is only Rs. 4,000 as the law stood then. Therefore, the appeal of the Insurance Company has to be allowed.

4. Regarding the cross-objection, two preliminary objections were raised. The first is that the appeal being one arising under a special statute, and the Civil Procedure Code, not being applicable to the Tribunal constituted under the said statute, *viz*., the Motor Vehicles Act, no cross-objection can be filed. It is pointed out that under section 110-D, though there is provision for any of the aggrieved parties to file an appeal, there is nothing in the section permitting a respondent to an appeal to file cross-objection.

5. In support of this contention, three decisions were relied on. The first is *Vedantacharsami* v. *Sri Muthiah Chetti*[1]. The other two decisions are not reported and they are in *Srinivasan* v. *Subbiah Chettiar*[2] and *Govindaraj* v. *Venugopal*[3]. One of these two decisions, *Srinivasan* v. *Subbiah Chettiar*[2], is rendered by Somasundaram, J., and the other is rendered by Maharajan, J. We are of the view that the above contention raised against the maintainability of the cross-objection is untenable. Under section 110-D of the Motor Vehicles Act, an appeal lies to this Court. It must be remembered that when once an appeal is entertained by this Court, all the provisions relating to the appellate jurisdiction of this Court are attracted. It is true that all the provisions of the Civil Procedure Code are not applicable to the Tribunal, because, it is a creature of the statute, but the

1. (1965) 68 L.W. 66.
2. A.A.O. No. 317 of 1967.
3. A.A.O. No. 222 of 1970.

appeal against the order of the Tribunal is to the High Court and not to any other Tribunal constituted under the statute. In *Secretary of State* v. *Rama Rao*[1] the question was whether the ordinary rules of the Civil Procedure Code, would apply to an appeal to the District Court against the decision of the Forest Settlement Officer under section 10 (2) of the Madras Forest Act. The Privy Council pointed out that the appeal being to the District Court which is one of the ordinary Courts of the country, the ordinary rules of the Civil Procedure Code, apply. *National Sewing Thread Company Limited* v. *James Chadwich and Brothers Limited*,[2] is a case under the Trade Marks Act, 1940. Under section 76 (1) of the said Act, an appeal shall lie from any decision of the Registrar under that Act to the High Court having jurisdiction. The question arose whether an appeal under clause 15 Letters Patent is maintainable against the decision of a single Judge of the High Court in an appeal under section 76 (1) of the said Act. It was pointed out by the Supreme Court that as the said Act had not made any provisions with regard to the procedure to be followed by the High Court in hearing the appeal under the said Act, the High Court has to exercise its appellate jurisdiction in the same manner as it exercises its other appellate jurisdiction and therefore when such jurisdiction was exercised by a single Judge, his judgment was appealable under clause 15 Letters Patent. As we pointed out earlier, section 110-D of the Motor Vehicles Act contemplates an appeal to the High Court. Once an appeal is entertained by this Court, all the rules in the Civil Procedure Code would be applicable to such an appeal inasmuch as no other procedure is prescribed under the said Act. That means, Order 41, rule 22, Civil Procedure Code would be applicable and the respondent in an appeal would be entitled to present a memorandum of cross-objections as provided under the said rules. Venkataraman, J., in disposing of *Venkatesan* v. *Ranganayaki*[3], has taken a similar view and we agree with the same. The Madhya Pradesh High Court in *Manjula Devi Butta* v. *Munjusri Raha*[1] and the Delhi High Court in *W. S. Bhagsingh and Sons* v. *Omprakash Kaith*[2] have taken the same view.

1. I.L.R. 39 Mad. 617: 43 I.A. 192: 31 M.L.J. 324: A.I.R. 1916 P.C. 21.
2. 1953 S.C.R. 1028: (1953) 2 M.L.J. 215: 1953 S.C.J. 509: A.I.R. 1953 S.C. 357.
3. A.A.O. No. 162 of 1972.

6. *Vedanthacharsami* v. *Sri Muthiah Chetti*[3] arises under section 51 of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948). Under that section, any person aggrieved by any decision of the Abolition Tribunal may appeal to a Special Tribunal consisting of two Judges of the High Court nominated from time to time by the Chief Justice in that behalf. The question arose whether the respondent in an appeal filed under section 51 of that Act can file a cross-objection. A Division Bench of this Court held that such a cross-objection cannot be entertained. But this decision has no application to the facts of the present case. As already seen, under section 51 of the Abolition Act, the appeal contemplated is not to the High Court as such, but only to a Special Tribunal consisting of two Judges of the High Court. Such a special Tribunal, even though consisting of two Judges of the High Court, is a creature of the statute and the provisions of the Civil Procedure Code, would not be applicable to such a Tribunal. Section 51 of the Abolition Act itself did not contemplate the filing of cross-objections by a respondent in an appeal under that section. It was under these circumstances, a Division Bench of this Court held that the cross-objection cannot be maintained. It is pointed out there that section 51 confers a special right on the aggrieved person in certain cases to appeal to a Special Tribunal, constituted by the Chief Justice and that there is no provision in the Act attracting the entire procedure laid down in the Civil Procedure Code, including the right to file cross-objections. The very reasoning contained in that decision would go to show that in the present case, a cross-objection is maintainable, because the appeal contemplated under section 110-D of the Motor Vehicles Act is not to a Special Tribunal but to the High Court. Undoubtedly all the provisions of the

1. 1968 A.C.J. 1.
2. 1971 A.C.J. 324.
3. (1955) 68 L.W. 66.

Civil Procedure Code, would be applicable to any proceeding before this Court even if it is an appeal under any special statute.

7. Somasundaram, J., in disposing of *Srinivasan* v. *Subbiah Chettiar*[1] has purported to follow the above Bench decision in *Vedantacharswami* v, *Sri Muthiah Chetty*[2] holding that no memorandum of cross-objections is entertainable in an appeal under section 110-D of the Motor Vehicles Act. There is no further discussion by the learned Judge in coming to that conclusion. All that the learned Judge says is that there is no provision in the special Act attracting the entire procedure laid down in the Civil Procedure Code, including the right to file the cross-objections and therefore the memo. of cross-objections does not lie. The learned Judge has over-looked the fact that the appeal is to the High Court to which the Civil Procedure Code, applies. For the reasons stated *supra* we are of the view that this decision of the learned Judge, (Somasundaram, J.), and that in *Govindaraj* v. *Venugopal*[3] by Maharajan, J., following the above decision are not correctly decided. We hold that a cross-objection would lie and the first preliminary objection is not tenable.

8. The second preliminary objection is that whatever be the right of the cross-objector against the appellant, namely, the Insurance Company, there cannot be a valid cross-objection against the owner of the vehicle who is also a respondent in the appeal. However, we think it is unnecessary to consider whether this objection is tenable or not, for, on merits, the cross-objection has to fail.

9. The finding of the Tribunal below is that the deceased was earning a sum of Rs. 150 per month. He was aged 39 years at the time of his death. Considering his age and the income, we do not think that the sum of Rs. 9,600 fixed as the total compensation payable to the claimants towards loss of benefit calls for any interference, even though the reasoning of the Tribunal below does not appear to be quite sound. The result is the appeal is allowed and the liability of the appellant (Insurance Company) is restricted to a sum of Rs. 4,000. The cross-objection is dismissed. There will be no order as to costs either in the appeal or in the cross-objections.

P.S.P. .. *Cross-objections dismissed.*

1. A.A.O. No. 317 of 1967.
2. 1955 61 L.W. 66.
3. A.A.O.No. 222 of 1970.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao* and *S. Natarajan, JJ.*

The Panchapandavamalai Masjid, represented by the Muthvallis Mahibunnissa Bi and others .. *Appellants**

v.

The State of Madras, represented by the Collector of North Arcot, Vellore and others .. *Respondents.*

Madras Court-Fees and Suits Valuation Act (XIV of 1955), sections 6 (2) and 6 (1) proviso —Lands belonging to public wakf—Government taking over without acquiring—Suit by mutawallis for recovery of possession—Compensation asked for if possession could not be had—Court-fee payable —Concession under G.O. Ms. No. 1617 Home, dated 15th May, 1961—Scope.

Mutawallis were in possession of suit lands for several years which formed part of a public wakf to which the Public Wakfs (Extension of Limitation) Act of 1959 applied. The lands along with the trees thereon were taken over by Government without acquiring them. The mutawallis sued for recovery of possession and for compensation on the same cause of action in case of failure to obtain possession. They paid Rs. 15 as Court-fee claiming the benefit of G. O. Ms. No. 1617 Home, dated 15th May, 1961.

On a question as to the proper Court-fee payable,

Held: The real point was whether the essential or primordial relief sought was only possession and the reference to the claim for compensation was ancillary, thereto or alternative to it. The word "ancillary" means subordinate to or arising out of something else, while the word "alternative" poses a disjunctive or a totally different relief

* Appeal No. 771 of 1967. 19*th November*, 1973.

other than the one mainly asked for. Only if the reliefs are alternative the obligation to pay a higher Court-fee under section 6 (2) of the Court-Fees Act will arise. If, however, on the same cause of action a major relief and an ancillary relief which is subordinate to or arising out of the main relief is sought the proviso to section 6 (1) will be attracted and the plaint shall be chargeable only on the value of the main relief.

[*Para.* 3.]

In view of the plaint averments it is clear that the claim for compensation must be held to flow from the main relief for possession. It is only an ancillary relief. [*Para.* 4.]

The Government Order G. O. Ms. No. 1617 Home, dated 15th May, 1961 pertains to restoration of possession of properties belonging to a public wakf. It pre-supposes a restoration of properties *in specie* and not the award of compensation as an equivalent. In case of the latter eventuality the general provision of the Court-Fees Act will apply and the plaintiffs will be under an obligation to pay the additional Court-fee on the amount of the money claim granted to them in case they ultimately succeed.

[*Para.* 5.]

Case referred to:—

Md. Mozaharal Ahmed v. *Md. Azimaddin,* A.I.R. 1923 Cal. 507.

Appeal against the decree of the Court of the Subordinate Judge, Vellore, dated 7th October, 1967 and passed in Check Slip No. 209 XVI-N in O.S. No. 9 of 1962.

N. Appu Rao, for Appellant.

The Additioral Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The plaintiffs in O.S. No. 9 of 1962 on the file of the Subordinate Judge, Vellore, who are the Muthavallis of the Panchapandavamalai Masjid, are the appellants. The main claim of the Muthavallis representing the mosque is that under an ancient inam title deed the suit properties were dedicated to the mosque by Nawab Sadattba Khan and by reason of such an endowment, the properties are part of a public wakf to which the Public Wakfs (Extension of Limitation Act of 1959) would apply. The case of the appellants is that they were in possession of these lands for several years in the past and recently the Government without acquiring the lands under the provisions of the Land Acquisition Act have interfered with the possession of the plaintiffs and took possession of a part of the wakf properties and converted the same into pucca roads or tracks. Consequent upon such taking over of the lands of the appellants, they had lost nearly four acres. The further case of the appellants is that by reason of such dispossession of the lands, they have lost permanently the right to the usufruct of as many as 204 trees thereon for well over a period of eight years. In these circumstances, the appellants filed the present action in O. S. No. 9 of 1962 on the file of the Subordinate Judge of Vellore and sought for recovery of possession of the lands and the trees thereon which were so appropriated by the Government in the manner stated above. On the same cause of action, which according to the plaintiffs, occurred in or about 1960-61, they seek for possession of the trees which stood thereon and compendiously seek an immediate monetary relief in the sum of Rs. 14,000 from the defendants, if they are unable to secure possession of the lands and the trees as claimed by them. The plaintiffs paid a Court-fee of Rs. 15, basing their right to pay such a quantum of Court-fee under G. O. Ms. No. 1617 Home, dated 15th May, 1961. This notification was issued and published in the usual manner in the *Fort St. George Gazette* giving relief of reduction of Court-fee payable in respect of suits for restoration of wakf properties under the Madras Court-fees and Suits Valuation Act. On a check-slip issued by the office for the purpose, the Court *suo motu* considered the issue whether the plintiffs have paid the proper Court-fee on the plaint and whether the allegations made therein would entitle them to take advantage of the concessional Government Order referred to above and refrain from

paying any additional Court-fee, even though, according to the terms of the plaint, the plaintiffs incidentally seek for a money relief of Rs. 14,000. The learned Judge was of the view that on a reading of the plaint, the plaintiffs should be deemed to have claimed the compensation of Rs. 14,000 in the alternative for their main claim of possession and applying section 6 (2) of the Madras Court-fees and Suits Valuation Act of 1955, he was also of the view that the plaint shall be chargeable with the highest of the fees leviable on the reliefs. The plaintiffs were, therefore, directed to pay a deficit of Court-fee of Rs. 1,035.50. Challenging the propriety and legality of this order, the plaintiffs have appealed.

2. Mr Appu Rao, learned Counsel for the plaintiffs, having invited our attention to the Government Order which entitled the plaintiffs to pay a Court-fee of Rs. 15 in so far as the plaint relief related to the restoration of the properties belonging to a public wakf, climed that the money claim of Rs 14,000 was only explanatory of his main claim for possession and that in the circumstances, it was never intended to be an alternative prayer and would, therefore, sustain that the Court-fee already paid is correct and the call for additional Court-fee is not warranted. The learned Government Pleader would, however, state that as the plaintiffs have incidentally urged in the plaint that their right to the usufruct was disturbed from the year 1952 and thereafter and as the money equivalent for the loss of such usufruct is claimed in the plaint, the totality of the plaint allegations ought not to be understood as a prayer for a bare suit for recovery of possession, but as a suit based on the same cause of action, in which two alternative reliefs are sought, one for the recovery of possession and the other in the alternative for the recovery of a sum of Rs 14,000 which is the money equvalent of the lands and trees wrongly taken possession by the Government.

3. Undoubtedly there is no equity in a tax and even so in Court-fees But Courts are reluctant to adopt such an interpreation, if a favourable interpretation is available on a reasonable understanding of the allegations in the plaint presented to a Court, against the plaintiffs in the action. The main claim, which the plaintiffs seek for in the suit is for recovery of possession of the properties belonging to the wakf. There is no dispute that this is a public wakf to which the concessional notification issued on 15th May, 1961 and referred to above applies. But the point is whether the essential or primordial relief asked for in the suit is only for possession and the reference to the claim for compensation is ancillary to the primary relief or alternative to it. The word "ancillary" in its grammatical sense would mean subordinate to or arising out of something else, whilst the word "alternative" poses a disjunctive or a totally different relief other than the one mainly asked for in the suit. If, therefore, the relief of compensation asked for in this suit by the plaintiff flows from the primary relief of possession, then it would be ancillary and would cease to be alternative. It is not in dispute that only if the reliefs are alternative, the obligation to pay a higher Court-fee under sub-section (2) of section 6 of the Court-fees Act would arise. But if on the same cause of action, a major relief and an ancillary relief, which is subordinate to or arising out of the main relief is sought, then the proviso to section 6 (1) of the Court-fees Act, is immediately attracted. Section 6 refers to multifarious suits. Sub-section (1) therein reads :

> "In any suit in which separate and distinct reliefs are sought based on the same cause of action, the plaint shall be chargeable with a fee on the aggregate value of the reliefs."

The proviso is, however, apposite in the case. The proviso says that provided that, if a relief is sought only as ancillary to the main relief, the plaint shall be chargeable only on the value of the main relief.

4. We have no hesitation after going through the allegations in the plaint and after hearing the submission of the learned Counsel that the main relief asked for in this action is for restoration of possession of properties belonging to a public wakf, which according to the

plaint were unfortunately taken over by the Government in or about 1952,1960-61. On the basis of the allegations in the plaint, it is difficult to hold that the claim for compensation does not flow from the main relief. If it does, the said relief can terminologically be called only as an ancillary relief and not as an alternative relief. To adopt the picturesque language of Mookerjee, J., who explained the term "compensation" in *Md. Mozaharal Ahmad* v. *Md. Azimaddin*[1] the term "compensation" etymologically suggests the image of balancing one thing against another and its primary signification is equivalence and the secondary and more common meaning is something given or obtained as an equivalent. The plaintiffs in the instant case are seeking for an equivalent in case possession of the lands are not made available to the mosque. In this sense, therefore, the claim for compensation is only an image of the main relief for possession and, is, therefore, to be termed as an ancillary relief.

5. If the plaintiffs, after trial, are unable to recover possession of the lands by reason of the supervening user of the same in public interest or for any other reason, the plaintiffs have taken the abundant precaution of claiming the image of their main relief or its equivalence therefor by asking for compensation. That would not mean that they are seeking an alternative relief. If supposing the plaintiffs' right is upheld after trial, but for some reason and mostly in public interest, the Court is unable to restore possession of the properties sought, is the Court helpless ? We do not think it is. It could, having regard to the ancillary claim made in the plaint, award such money compensation which is its equivalent and to which the plaintiffs would be entitled. In those circumstances, however, the plaintiffs cannot claim the benefit of the concession given to them under the Government Order G. O. Ms. No. 1617 Home, dated 15th May, 1961. The above Government Order pertains to restoration of possession of properties belonging to a public wakf. This pre-supposes a restoration of properties *in specie* and not the award of compensation as an equivalent. If such a situation arises, and if the plaintiffs are granted only compensation by working out the main relief in terms of money, then it follows that the general provision of the Court-fees Act would apply, and they are under an obligation to pay the additional Court-fee on the amount of the money claim granted to them in case they ultimately succeed.

6. In this view the Court-fee paid on the plaint is in accordance with the provisions of the Court-fees Act read with the G. O. Ms. 1617 Home, dated 15th May, 1961 and the order of the Court below which interpreted the allegations to mean that the claim for compensation is an alternative one is not sustainable. The Lower Court shall restore the plaint to its file and set it for trial in the usual course.

7. The appeal is allowed, but there will be no order as to costs. It is, however, made clear that in case the plaintiffs secure a money compensation, the Government would be entitled to the Court-fee in accordance with the ordinary provisions of the Madras Court-fees Act.

P.S.P. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

Lingasami Goundar .. *Petitioner**

v.

S. K. Subramanian and others .. *Respondents.*

Provincial Insolvency Act (V of 1920)—Application under section 10 for adjudication as insolvent—Enquiry under section 24—Scope.

An enquiry under section 24 of the Provincial Insolvency Act is limited in scope. The Court will not allow a full delve into the capcity of the applicant to pay his debt. When the statute uses the words " *prima facie* grounds" for believing the statement of the debtor

1. A.I.R. 1923 Cal. 507.

* C.R.P. No. 273 of 1972, 29th November, 1973.

of his inability to pay his debts, the degree of the burden of proof that is called for by the statute is not to be equated to the degree of proof as is always necessary in an ordinary civil litigation. The statute requires such a summary satisfication because there are various levers provided for in the Act itself which enable the creditors to annul the adjudication on various grounds, including the ground that the debtor had suppressed his assets and that he was in a position to pay his debts fully etc. A detailed examination is not warranted. If a person approaches the Court by inflicting on himself the ignominy of his inability to pay his debts and in consequence seeks for an order adjudicating him insolvent, then unless there was strong evidence to disprove such a voluntary confession made by him, the Court need not at that stage employ itself in a deep enquiry regarding the opulence of the debtor and his ability to pay his debts.

[*Para.* 2.]

Petition under section 75 (1) of the Provincial Insolvency Act praying the High Court to revise the order of the District Court, Madurai, dated 9th September, 1971 and made in C. M. A. No. 130 of 1970 (I.P. 14/67. Sub-Court, Dindigul dated 16th March, 1970).

R. Nandakumar, for Petitioner.

M. V. Krishnan, for Respondents.

The Court made the following

ORDER.—The learned District Judge of Madurai was right when he allowed the application of the respondent under section 10 of the Provincial Insolvency Act, by permitting him to be adjudicated insolvent on his own petition, on the ground that he was unable to pay the debts of his creditors. The petitioner before me is one of his creditors. In a summary examination which the Court has to undertake under section 24 of the Act, the trial Court, instead of limiting its enquiry to a *prima facie* examination of the ability of the respondent to pay his debts, made a detailed enquiry about his assets and liabilities, and came to the conclusion that the act of insolvency as set out by him had not been established. The appellate Court rightly posed itself the question whether the respondent was in a position to pay his debts, particularly a large decree debt due to the petitioner. It noticed several decisions of this and other Courts and was of the view that the enquiry under section 24 of the Act was limited in scope and in that context, it would not allow a full delve into the capacity of the respondent to pay his debts. It was of the view that at that stage there was on record *prima facie* evidence, besides the admission of the debtor himself that he was unable to pay his debts. In those circumstances, it adjudicated the respondent insolvent on his own petition. It is an against this order the present revision petition has been filed.

2. The learned Counsel for the petitioner did not place before me any authority to show that the proof required to be adduced by the debtor when he presents a petition to the appropriate Court for being adjudicated insolvent on his own petition is something which is in the nature of the proof that is required in normal civil cases. The proviso to section 24 (1) (*a*) of the Act itself says that the debtor, for the purpose of proving his inability to pay his debts, will be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same and that the Court, if and when so satisfied, shall not be bound to take any further evidence thereon. When the statute uses the word *prima facie* grounds "for believing the statement of the debtor of his inability to pay his debts, the degree of the burden of proof that is called for by the statute is not to be equated to the degree of proof as is always necessary in an ordinary civil litigation. Obviously the statute requires such a summary satisfaction, because there are various levers provided for in the Act itself which enable the creditors to annul the adjudication on various grounds, including the ground that the debtor has suppressed his assets and that he is in a position to pay his debts fully, etc. Bearing this is mind, the appellate Court accepted the evidence of the respondent and adjudicated him insolvent. But what is urged is that there must be a stricter examination

of the capacity of the respondent's ability to pay his debts, by examining the nature of his assets, his properties, etc. In my view such a detailed examination is not warranted. If a person approaches the Court by inflicting on himself the ignominy of his inability to pay his debts and in consequence seeks for an order adjudicating him insolvent, then, unless there is strong evidence to disprove such a voluntary confession made by him, the Court need not at that stage employ itself in a deep enquiry regarding the opulence of the debtor and his ability to pay his debts. A summary enquiry is indicated ; *prima facie* proof is called for and if that is undertaken and if a decision is rendered by the appropriate Court, then it cannot be said that such an order is without jurisdiction or suffers from any material irregularity. The High Court also, under section 75 (1) of the Act, is only expected to see whether the order of the appellate Court is in accordance with law or not. The lower Court says that *prima facie* it is satisfied that the respondent is unable to pay his debts. This is a finding based on appreciation of material considered by the Court below. The order otherwise cannot be said to be not in accordance with law.

3. The civil revision petition is dismissed. There will be no order as to costs.

P.S.P. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Natarajan, J.*

Krishnakumar, minor, represented by mother and guardian Rani Ammal. .. *Petitioner**

v.

N. Govardhana Naidu and another .. *Respondents.*

Civil Procedure Code (V of 1908) Order 22, rule 5—Suit for partition — Death of a defendant—Will left by deceased defendant—Application to bring on record legal representative—Contest — Scope of enquiry by Court—Not an order "finally decided by a Court."

Though a duty is cast by rule 5 of Order 22, Civil Procedure Code, on the Court to determine who is the legal representative of a deceased plaintiff or a deceased defendant, there need not be a comprehensive and exhaustive enquiry to determine the person who could be properly designated the legal representative of a deceased party in a pending action, for the simple reason that any decision so rendered by a Court in pursuance of an enquiry under Order 22, rule 5, has its inherent limitations. The recognition of a rival contender as the legal representative of a deceased party in a pending action is only to facilitate the early disposal of the pending action. Any recognition of right given by a Court in such a proceeding will not confer rights on the recognised representative in the estate or property of the deceased person, nor will such a finding operate as *res judicata* in subsequent proceedings. The very fact that no appeal is provided from an order passed under Order 22, rule 5, will go to show that the order cannot be characterised as one " finally decided by a Court" as contemplated in section 11 of the Code.

[*Para.* 6.]

Therefore, all that is required of a Court before which there is a contest as to who is the proper legal representative of a deceased plaintiff or defendant is to

* C.R.P. No. 1646 of 1973.
25th January, 1974.

find out as to who has got a *prima facie* claim to represent the estate of the deceased and to confer on him the status of the legal representative of the deceased party. [*Para.* 7.]

Cases referred to :—

Gaor Bachan Singh v. *Gian Singh*, A.I.R. 1922 Lah. 175 ; *Maung Po Mya* v. *Ma Gyan Bon*, A.I.R. 1923 Rang. 114; *Beni Madho* v. *Sri Ram Chandraji*, A.I.R. 1937 All. 192; *Parsotam Rao* v. *Janaki Bai*, (1906) I.L.R. 28 All. 109 ; *Dukh Khan* v. *Dulhon Bahasa*, A.I.R. 1939 Pat. 390 : *Mohammed Khan* v. *Jan Mohammed*, A.I.R. 1939 Lah. 580 ; *Nagappa* v. *Karuppiah*, A.I.R. 1925 Mad. 456.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge of Tirupattur dated 3rd January, 1973 and made in I.A. No. 521 of 1972 in O.S. No. 41 of 1968.

R. Dhandapani, for Petitioner.

T. S. Ramu, for Respondents.

The Court made the following

ORDER.—The question for consideration in this revision petition is whether the order of the Subordinate Judge of Tirupattur in I.A. No. 521 of 1972 in O.S. No. 41 of 1968 on the file of his Court holding that the revision petitioner is not the legal representative of the deceased second defendant is a sustainable order or not.

2. Respondents 1 and 2 herein who were arrayed as the plaintiff and first defendant in the suit are brothers and are the grandsons of the deceased 2nd defendant through her daughter. The first respondent as plaintiff filed the suit for partition and separate possession of his 1/4th share in the A schedule property and half share in the B schedule property. It is not disputed that the first defendant is entitled to the remaining half share in the B schedule property and 1/4th share in the A schedule property. It is also the common case of parties that the second defendant was solely entitled to the remaining half share of the A schedule property in pursuance of a registered will executed by her sister Balambal on 2nd June, 1928. She was made a party to the suit inasmuch as she was in joint possession of the A schedule property along with the plaintiff and the first defendant.

3. After the trial of the suit was over and the suit was posted for judgment, the second defendant died on 21st February, 1971. Preliminary decree in the partition suit was nevertheless passed on 27th February, 1971. Thereafter the plaintiff filed I.A. No. 521 of 1972 under Order 22, rule 4 of the Code of Civil Procedure, praying that his minor son the petitioner in this revision petition be impleaded as the legal representative of the deceased second defendant. The case set up by the plaintiff in the affidavit filed in support of the application is that on 19th January, 1971, the second defendant executed a registered will Exhibit A-1 bequeathing her half share in the *A* schedule property to the revision petitioner and as such the revision petitioner was entitled to be brought on record as the legal representative of the deceased second defendant. The application was vehemently opposed by the first defendant on the ground that the will, despite its registration, was brought about by fraud, undue influence and coercion and that as such the revision petitioner ought not to be given recognition as the legal representative of the second defendant and brought on record.

4. On account of the rival contention of the parties about the legality and validity of the will, the learned Subordinate Judge proceeded to record detailed evidence of both parties in support of their respective contention and ultimately he held for several reasons set out by him in his order that the will on which reliance was placed to get recognition of the petitioner as the legal representative of the deceased second defendant must have been brought about by either fraud or undue influence and therefore the revision petitioner cannot be recognised as the legal representative of the deceased second defendant

and brought on record. Aggrieved by this order, the revision petitioner has come forward with this revision.

5. I am afraid that the learned Subordinate Judge has completely misconstrued the purport and the object of Order 22, rule 3 and rule 4 and the scope of the enquiry that has to be conducted as contemplated under Order 22, rule 5 of the Code of Civil Procedure, when there are rival claimants for getting recognition of the Court as the legal representative of a deceased plaintiff or defendant in a pending action. Order 22, rule 5 reads as follows :

> "When a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court....."

6. It is needless to say that though a duty is cast by rule 5 of Order 22, on the Court to determine who is the legal representative of a deceased plaintiff or a deceased defendant, there need not be a comprehensive and exhaustive enquiry to determine the person who could be properly designated the legal representative of a deceased party in a pending action, for the simple reason that any decision so rendered by a Court in pursuance of an enquiry under Order 22, rule 5 of the Civil Procedure Code, has its inherent, limitations. The recognition of a rival contender as the legal representative of a deceased party in a pending action is only to facilitate the early disposal of the pending action. Any recognition of right given by a Court in such a proceeding will not confer rights on the recognised representative in the estate or property of the deceased person, nor will such a finding operate as *res judicata* in subsequent proceedings. The very fact that no appeal is provided from an order passed under Order 22, rule 5, Civil Procedure Code, will go to show that the order cannot be characterised as one "finally decided by a Court" as contemplated in section 11, Civil Procedure Code.

7. Therefore, all that is required of a Court before which there is a contest as to who is the proper legal representative of a deceased plaintiff or defendant is to find out as to who has got a *prima facie* claim to represent the estate of the deceased and to confer on him the status of the legal representative of the deceased party.

8. In *Goor Bachan Singh* v. *Gian Singh*[1] it was held that the Court is not bound to make a lengthy and elaborate enquiry into the question whether the proposed legal representative was the legitimate son of the deceased party. The Court further observed as follows :

> "For the purposes of Order 22, rule 5, Civil Procedure Code, it is sufficient for us to find that Gian Singh has succeeded in forcing recognition of his status upon Mussamat Gurdial Kaur and that he has intermeddled with Rattan Singh's estate and is actually in possession of a portion of it. We accordingly direct that Gian Singh be brought upon the record as the legal representative of Rattan Singh."

9. In *Maung Po Mya* v. *Ma Gyan Bon*[2] it was held as follows :—

> "The provisions of Order 22 seem to be framed for the sole purpose of providing for the continuance of litigation on a party dying or changing his legal character. If, under rule 5, of the Order a question is raised, at the proper time as to who is the legal representative or who are the legal representatives then for the purpose of the suit, and for that purpose only, the Court has to decide the point. The Court quite obviously cannot under the provisions of that Order, come to any binding decision as between the various claimants to the estate. All that it can decide is who is to represent the estate for the purposes of the suit. And once the Court has decided on that point, then the person the Court adds to the record as legal representative is the legal representative for the purpose of that suit, just as surely as if he were appointed for

1. A.I.R. 1922 Lah. 175.
2. A.I.R. 1923 Rang. 114.

the purpose by a District Judge under the provisions of section 38 of the Probate and Administration Act."

10. The Allahabad High Court also has taken the same view as in *Beni Madho* v. *Sri Ram Chandraji*[1]. It held as follows :

"So far as the two rival claimants are concerned, the question as to who was the legal representative of the deceased was not fully adjudicated upon and could be reagitated as between them. Therefore, that order was not a final adjudication of the right of the parties by the Court at all. All that was necessary was to bring on the record some person who was found to be legal representative of the deceased so that the case may be proceeded with and the rights of the opposite party finally determined."

11. As I have stated earlier, any decision rendered by a Court purporting to give its decision under Order 22, rule 5 of the Civil Procedure Code will not operate as *res judicata*. The same view has been taken in *Parsotam Rao* v. *Janaki Bai*[2], *Dukh Khan* v. *Dulhon Bihasa*[3] and *Mohammed Khan* v. *Jan Mohammed*[4].

12. In the instant case the learned Subordinate Judge failed to note that merely by giving recognition to the revision petitioner as the legal representative of the deceased second defendant, the revision petitioner will not be entitled to automatically proclaim that the will executed in his favour by the second defendant is a genuine and valid will and that it is unassailable. In the partition suit the second defendant was added only as a formal party. No relief was asked for against her or in respect of her half share in the A schedule property and the preliminary decree reads that the plaintiff will be entitled to ¼th share in the A schedule property and a half share in the B schedule property. Inasmuch as there is a registered will in favour of the revision petitioner, the learned Subordinate Judge could well have held that *prima facie* the revision petitioner was entitled to represent the estate of the second defendant and be brought on record as the legal representative. The controversy between the parties about the legality and the validity of the will is to be thrashed out and determined in separate proceedings in that behalf and the mere recognition of the revision petitioner as legal representative of the deceased second defendant can never confer on him rights to enforce the will nor is the 1st defendant estopped from contending in appropriate proceedings that the will was brought about by fraud or undue influence or coercion and that it was not binding on him. It is no doubt true that a Court has to make an enquiry when there are rival claimants to get recognition as legal representative of a deceased plaintiff or defendant and determine the question judicially. But such enquiry need be lengthy only where the circumstances and the facts of the case warrant the same. The order of the Subordinate Judge is therefore, clearly unsustainable.

13. The learned Counsel for the second respondent however placed reliance on a decision of this Court in *Nagappa* v. *Karuppiah*[1] in support of his contention that when a question arises for determination under Order 22, rule 5 of the Civil Procedure Code whether a person is or is not the legal representative of a deceased plaintiff or defendant, the question ought to be determined by the Court unambiguously and for that purpose the Court must take evidence and then decide for itself as to who has got the better claim. The Court further held that if the trial Court failed to follow the procedure the High Court was entitled to interfere in the matter in exercise of its revisional powers. The authority relied on by the learned Counsel can have no application to the facts of this case. That was a case where a managing member of a Hindu joint family instituted the suit and the suit itself referred to joint family estate. It was really a suit in a representative character for all the members of the family. It was in such circumstances that the controversy arose as to who among the rival claimants was entitled to step into

1. A.I.R. 1937 All. 192.
2. (1906) I.L.R. 28 All. 109.
3. A.I.R. 1963 Pat. 390.
4. A.I.R. 1939 Lah. 580.

1. A.I.R. 1925 Mad. 456.

the shoes of the deceased plaintiff. In the instant case no such complications arise. As I have already stated above, the suit was not directed against the property of the deceased or against her personally. She was only a formal party to the suit. The controversy was between the plaintiff and the first defendant and their respective shares in the suit properties.

14. In the result, the revision petition is allowed and the order of the Subordinate Judge is set aside. I.A. No. 521 of 1973 filed by the plaintiff to implead the revision petitioner herein as legal representative of the second defendant will stand allowed. If such an order is not passed, it may well be that a stalemate may arise and no final decree can be passed in the suit without anybody being brought on record as legal representative of the deceased second defendant. There will be no order as to costs.

S.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Natarajan, J.*

P. T. Srinivasan .. *Appellant**

v.

Sri Malleeswarar Devasthanam by Trustees and others .. *Respondents.*

Madras City Tenants' Protection Act (III of 1922), section 9 (1)—Suit for ejectment—Application under the Act—Proper order to be passed—Market value—Computation.

A Court dealing with an application under section 9 (1) (*a*) of the Madras City Tenants Protection Act cannot pass a piecemeal order, but on the other hand it has to pass a composite order which will make reference to the right of the tenant to have the land sold to him, the extent of the land to be sold to him and also the price for which that is to be sold. It is clear from the wording of section 9 (1) (*b*) that the order contemplated under section 9 (1) (*a*) (i) must be a composite order and there cannot be a multiplicity of orders. [*Para.* 6.]

The order under section 9 (1) (*a*) (i) cannot have a dual aspect *viz.*, one phase dealing with the right of the tenant to get a sale of the land over which he has put up the superstructure and the other phase of it dealing with the price the tenant has to pay for the land made available to him by a prior order of the Court in his favour ; the reason is that it is open to the tenant to refuse to abide by the order of the Court and pay the price fixed for the land and thereby give up his rights under the Act to buy the land leased to him. [*Para.* 6.]

The average market-value has to be computed with reference to transactions which took place within three years prior to the Court passing its order fixing the value of the site under the occupation of the tenant. [*Para.* 7.]

Appeal against the order of the City Civil Court (IVth Assistant Judge), Madras, dated 1st September, 1971 and made in I.A. No. 16074 of 1967 in O.S. No. 1439 of 1968.

K. Shanmugham and *P. Murugaiyan,* for Appellant.

T. R. Arunachalam and *P. V. G. Rathinam,* for Respondents.

The Court delivered the following

JUDGMENT.—In a suit for ejectment filed by the trustees of Sri Malleswarar Devasthanam, the respondents herein, the defendant, *viz.*, the appellant in this appeal, contended that he was entitled to the benefits conferred by the Madras City Tenants Protection Act, 1921 and in accordance with such plea, he filed a petition, I.A. No. 16074 of 1967 under section 9 (1) of the Madras City Tenants Protection Act, 1921, hereinafter referred to as the Act. The respondent conceded the claim of the appellant and made an endorsement to that effect on 13th December, 1969. Thereafter, the learned IVth Assistant Judge, City Civil Court who dealt with the petition appointed a Commissioner to inspect the property in the occupation of the appellant and give a report about the probable value of the property. After making a local inspection and after taking into consideration the documents filed by the respondents,

* A.A.O. No. 151 of 1972. 22nd February, 1974.

the Commissioner gave his report, Exhibit C-1, stating therein that the total extent of two grounds and 2,127 square feet which has to be conveyed to the appellant can be so done at the rate of Rs. 12,000 per ground. It may be mentioned even at this juncture that the appellant who now contends that the valuation of the property at Rs. 12,000 per ground by the Commissioner is excessive, did not file any document before the Commissioner in support of his contention that the site was not worth Rs. 12,000 per ground but was worth much less. After independently considering the documents furnished by the respondents and the report of the Commissioner, the learned IVth Assistant Judge accepted the valuation given by the Commissioner and called upon the appellant on to deposit a sum of Rs. 34,635 within a period of one year towards the value of the site. It is as against that order, the tenant has come forward with this appeal.

2. Mr. K. Shanmugham, learned Counsel for the appellant would contend that the Commissioner as well as the lower Court have committed an error in taking into consideration several documents which were outside the period set under the Act for computation of the value of the property and as such the fixation of the value of the site in the occupation of the appellant at the rate of Rs. 12,000 per ground is unsustainable. To appreciate the contention of the learned Counsel the dates of the several documents which have been taken into consideration by the Commissioner and the learned IVth Assistant Judge have got to be mentioned. Exhibit A-1, dated 3rd April, 1968 is a registration copy of a sale deed which discloses sale of a site situate in Prasanna Vinayagar Koil Street, Mylapore, a locality within a distance of two furlongs from the land in question at the rate of Rs. 12,270 per ground. Exhibit A-2, dated 11th September, 1970 is the registration copy of sale deed disclosing a sale of vacant site in a locality close by to the site in question at the rate of Rs. 15,000 per ground. Exhibit A-3, dated 12th December, 1966 is a notice issued under the Madras Urban Land Tax Act fixing the site value in that locality at Rs. 10,000 per ground. Exhibit A-4, dated 1st August, 1970 is an order of the Commissioner, Hindu Religious and Charitable Endowments fixing the value of sites in the locality in question at Rs. 15,000 per ground. Exhibits A-5 and A-7 of the year 1967 respectively are notices issued under the Madras Urban Land Tax Act and Exhibit A-6 is an order of the Assistant Commissioner of the year 1966. In general, it may be stated that the notices issued under the Urban Land Tax Act as well as the order passed under the same Act, have also been relied upon by the Commissioner to fix the value of the site in question at Rs. 12,000 per ground.

3. The contention of Mr. Shanmugham is that according to section 9 (1) (*b*) of the Act, the lower Court was entitled to take into consideration only transactions which took place within three years before the date when the tenant's right to buy the land was conceded by the lower Court and that such a procedure has not been followed by the lower Court and consequently the order passed by it is not legally sustainable. In support of this contention, the learned Counsel places reliance upon the following portion occurring in section 9 (1) (*b*) of the Act:

> "The price aforesaid shall be the average market value of the three years immediately preceding the date of the order."

On a consideration of the matter, I find that the contention of the learned Counsel is wholly unsustainable.

4. Before dealing with the relevant sections in the Act, which will have a bearing upon the dispute on hand, it is necessary to set out certain facts. The objection now raised in the appeal as regards the period with reference to which the Commissioner should have evaluated the property, was not raised before the lower Court by way of objections to the Commissioner's report. On the other hand, what has been urged before the lower Court was that the Commissioner had failed to fix the value of the land with reference to the average value of the transactions which took place in that locality. Before the lower Court also, this objection has not been placed as no reference is made by the trial Judge to any such objection raised by the tenant. As a

matter of fact, even in the grounds set out in the memorandum of appeal, the objection has not been taken by the appellant. In spite of these things, I gave opportunity to the learned Counsel for the appellant to raise this objection as he pleaded that it was one of law and therefore required consideration by this Court.

5. The relevant portions of section 9 which require mention in connection with the contention put forth by the learned Counsel for the appellant are as follows:—

> "9 (1) (*a*) (i) :—Any tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted or proceeding under section 41 of the Presidency Small Causes Courts Act, 1862, taken by the landlord may, within one month of the date of the Madras City Tenants' Protection (Amendment) Act, 1955, coming into force or of the date with effect from which this Act is extended to the municipal town or village in which the land is situate or within one month after the service on him of summons, apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court, the whole or part of, the extent of land specified in the application.
>
> 9 (1) (*b*) :—On such application, the Court shall first decide the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. The Court shall then fix the price of the minimum extent of the land decided as aforesaid, or of the extent of the land specified in the application under clause (*a*) whichever is less. The price aforesaid shall be the average market value of the three years immediately preceding the date of the order. The Court shall order that within the period to be determined by the Court, not being less than three months and not more than three years from the date of the order, the tenant shall pay into Court or otherwise as directed the price so fixed in one or more instalments with or without interest."

From the portions of the section extracted above, it may be seen that the order that has to be sought for by a tenant filing a petition under section 9 (1) (*a*) should be for the Court to direct the landlord to sell for a price to be fixed by the Court, the whole or part of the extent of the land specified in the application.

6. Mr. Shanmugham would contend that an order to be passed under section 9 (1) (*a*) will actually consist of two stages *viz.*, (1) an order in the first instance upholding the contention of the tenant that he is entitled to have direction in his favour calling upon the landlord to sell to him the whole or part of the extent of land specified in the application and (2) a further order by the Court at a later date fixing the price for the extent of land so ordered to be sold by the landlord to the tenant. The wording of section 9 (1) (*a*) (i) itself does not lend support to the interpretation given by the learned Counsel. As a matter of fact, the records themselves show that the lower Court has not passed two separate orders as is sought to be made out by the counsel. When the respondents (plaintiffs) made an endorsement on the application of the appellant that the Devasthanam concedes the right of the tenant to get a sale of the land leased out to him, the learned IV Assistant Judge has not passed an order in terms of the endorsement and held that the tenant was entitled to a preliminary order in his favour and that a further order will ensue after the price for the land offered to be sold was determined. In the very nature of things, a Court dealing with an application under section 9 (1) (*a*) cannot pass such a piecemeal order but on the other hand it has to pass a composite order which will make reference to the right of the tenant to have the land sold to him, the extent of the land to be sold to him and also the price for which that is to be sold. That the order contemplated under section 9 (1) (*a*) (i) must obviously be a composite order and cannot be a multiplicity of orders is clearly brought out by the words occurring in section 9 (1) (*b*). The first sentence in section 9 (1) (*b*), states that on application being made under section 9 (1) (*a*), the Court has to decide the minimum extent of land which has to be sold to the tenant for his convenient enjoyment of the property. The next sentence makes reference to the duty of the Court to fix the price of the land which has to be sold to the tenant by the

landlord. The third sentence provides the guideline for the Court as to how the market value of the land has to be fixed and that makes reference to the average market value of the land during the three years immediately preceding the date of the order. The next sentence provides that the Court has got the right to call upon the tenant to pay the price fixed for the land at a period fixed by the Court, such period, however, not being less than three months and not mere than three years from the date of the order. The word "order" occurring in this sentence can have reference only to a composite order passed by the Court under section 9 (1) (*a*) (i) and cannot have reference to two independent and separate orders as is sought to be contended by the learned Counsel for the appellant. If it was the intention of the Legislature that two orders should be passed, *viz.*, first an order upholding the claim of the tenant and second a further order fixing the value of the land, the Legislature would have specifically made reference to the two orders that are to be passed by the Court at two different stages of the case. In the very nature of things, the order contemplated under section 9 (1) (*a*) (i) cannot have a dual aspect, *viz.*, one phase dealing with the right of the tenant to get a sale of the land over which he has put up the superstructure and the other phase of it dealing with the price the tenant has to pay for the land made available to him by a prior order of the Court in his favour ; the reason is that it is open to the tenant to refuse to abide by the order of the Court and pay the price fixed for the land and thereby give up his rights under the Act to buy the land leased to him. If the tenant were to adopt such a course, it would lead to the anomalous position of the earlier order of the Court declaring the tenant to be entitled under section 9 (1) (*a*) (i) of the Act to buy from the landlord the site leased out to him and over which he has constructed the superstructure, remaining unaltered and unaffected and the later order of the Court calling upon the tenant to pay certain price for the land remaining unimplemented. The landlord would then be left in the unenviable position of not getting from the tenant the price for the land ordered to be sold by the Court and, at the same time, being confronted with the earlier order of the Court declaring the tenant to be entitled to get sale of the land leased out to him as per section 9 (1) (*a*) (i) of the Act. It is only to avoid such tragic consequences that the order contemplated under section 9 (1) (*a*) (i) of the Act must be a composite one, *i.e.*, declaring the right of the tenant to obtain a sale of the land from the landlord and also fixing the price at which the tenant can obtain a sale of the land in his favour. If the tenant fails to comply with the order by paying the price for the land when called upon to do so by the Court at the rate fixed by it, the Court can set aside the order in favour of the tenant in its entirety and declare the landlord to be eligible to evict the tenant and take possession of the land.

7. From another point of view also, the contention of Mr. Shanmugham cannot be sustained. It is needless to say that the average market value fixed by the Court under section 9 (1) (*b*) must have close proximity to the order passed by the Court. If the contention of the learned Counsel for the appellant were to be upheld, the contingency may arise in certain cases where a long interval of time may be taken by the Commissioner to inspect the property and fix its average market value. In such cases, the order of the Court fixing the average market value of the land will have no reference to the state of affairs when the Court passes its order and surely such a state of affairs would not have been contemplated by the Legislature. It must therefore necessarily be held that the average market value has to be computed with reference to transactions which took place within three years prior to the Court passing its order fixing the value of the site under the occupation of the tenant. Therefore, the contention of the learned Counsel that the Commissioner as well as the lower Court have committed an error in taking into consideration documents reflecting transactions of later origin than the period 13th December, 1966 to 13th December, 1969, cannot be sustained.

8. Once this objection of the learned Counsel for the appellant is discountenanced, there is really no basis for the appel-

lant to contend that the fixation of the value at Rs. 12,000 per ground is excessive or unfair. The land in question, though it does not abut any main road, has close proximity to two important streets, *viz.* Chinna-Malleswarar Street on the one side and Prasanna Vinayagar Koil Street on another side. It is seen from the Commissioner's report that in close proximity to the site, markets, bus-stands, school, temples are all situate. The Commissioner has further stated that the property is situate in an important and busy locality. The sale transaction under Exhibit-A-1 discloses that the site sold therein has been sold at the rate of Rs. 12,270 per ground. The learned Counsel for the appellant cannot advance any criticism about this sale deed because it is admittedly within the period conceded by him. He would, however, contend that the sale is inclusive of the coconut trees standing on the site. However, the existence of coconut trees would not have enhanced the value of the site appreciably because, of necessity, the number of coconut trees thereon must have been only small when, admittedly, the sale deed makes reference to the site sold being a vacant building site. The appellant must really consider himself fortunate in getting the suit site at the rate of Rs. 12,000 per ground and his contention in the memorandum of appeal that the site should be sold to him at the rate of Rs. 6,000 per ground, besides being devoid of any basis, is one without any grace or justice.

9. In the result, I find that the appeal is wholly devoid of merit and it will therefore stand dismissed with costs.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—*P. S. Kailasam and S. Maharajan, JJ.*

L. G. Balakrishnan and Brothers (P.) Limited, Transport House, Tiruchi and others .. *Appellants**

v.

The Regional Transport Authority, Madurai and another *Respondents.*

Motor Vehicles Act (IV of 1939), section 91 (1) and Chapter VI—Rule 268 of Rules framed under the Act—Scheme for construction of public stand by local authority—Need for approval by Regional Public Authority—Subsequent steps and notification as public stand by Regional Transport Authority—Pre-requisites for collection of fee from a public service vehicle.

Where a scheme for a public stand framed by a Panchayat under the Motor Vehicles Act was approved by the Regional Transport Authority, on the report from the Panchayat of the implementation of the scheme the Regional Transport Authority has to proceed under rule 268 (*d*) of the Rules made under section 91 (1) of the Act and notify the stand as a public stand and then alone fees can be levied by the Panchayat [*Para.* 4.]

The notification by the Regional Transport Authority of the stand as a public stand under rule 268 (*d*) and the putting up of a copy of such a notification on the notice board at the office of Regional Transport Authority are necessary conditions preceding the levy of any fees from public service vehicles. [*Paras.* 2 *and* 4.]

Proceedings of the Regional Transport Authority stating that it approved the scheme under rule 268-A cannot be construed as proceedings under rule 268 (*d*). [*Para.* 4.]

Appeals under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Ramaprasada Rao, dated 27th April, 1973 and made in the exercise of the Special Original Jurisdiction of the

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* W.A.Nos. 72, 96 and 97 of 1973 in W. P. Nos 2797 to 2799 of 1973. *22nd October,* 1973.

High Court in Writ Petition Nos. 2797 to 2799 of 1973 respectively presented under Article 226 of the Constitution of India to issue writ of *certiorari*, calling for the records relating to the order of the Regional Transport Authority, Madurai in R. No. 27126 of 1972, dated 7th January, 1973 in all the petitions and to quash the same.

V. Subramaniam, for Appellant.

The Government Pleader. *S. Mohan* and *K. Alagiriswami*, for Respondents.

The Judgment of the Court was delivered by

Kailasam, J.—These Writs Appeals are filed against the judgment of Ramaprasada Rao, J., in Writ Petitions Nos. 2797, 2798 and 2799 of 1973. These matters relate to the legality of a levy of fees for using the bus stand at Vedasandur, and can be dealt with by a common order.

2. Section 91 (1) of the Motor Vehicles Act enables the State Government to make rules for the purpose of carrying into effect the provisions of Chapter VI of the Act, and clause (*e*) of sub-section (1) of that section empowers the State Government to make rules for the maintenance and management of parking places and stands and the fees, if any, which may be charged for their use. In pursuance of this rule-making power, the State Government framed rule 268 by G.O. Ms. No. 2358, Home, dated 18th July, 1966, substituting rule 268. Rule 268 (*a*) provides that the local authority shall apply to the Regional Transport Authority for approval of any scheme for construction of a public stand for any class of public service vehicles. It is provided that the application shall be accompanied by a sketch of the proposed site and the blue print of the structures proposed to be erected. After the receipt of the proposal under rule 268 (*a*), the Regional Transport Authority is empowered to approve the scheme proposed by the local authority in the interest of the public generally or to refuse the scheme. When the Regional Transport Authority approves the scheme, the scheme shall remain in force for a period of three years or for such shorter period as may be specified in the order of the Regional Transport Authority. After the approval of the scheme, the local authority is expected to implement the scheme within the period mentioned in the application. If the scheme is not implemented, the Regional Transport Authority may revoke the order approving the scheme after giving the local authority an opportunity of making its representations, if any, against such revocation. After the implementation of the scheme, the local authority is required to report to the Regional Transport Authority as to when the scheme has been implemented. On receipt of such a report, the Regional Transport Authority may after such enquiry or inspection notify the stand as a public stand for the particular class of public service vehicles for which the scheme was approved. A copy of the notification shall be put on the notice board at the office of the Regional Transport Authority. When a public stand within the limits of a local authority has been notified by the Regional Transport Authority, any public service vehicle of that class for which the stand is intended, shall make use of that stand for purposes of stationing the vehicle for picking up or setting down passengers. When once a stand is notified, a public service vehicle is required to use it on payment of a fee prescribed under the rule.

3. Thus, it will be seen from the rules that the procedure is for the local authority to send the scheme to the Regional Transport Authority for approval and the scheme, after approval by the Regional Transport Authority will have to be implemented by the local authority. After implementation, the local authority has to inform the Regional Transport Authority which has got to notify the stand as a public stand. When once the stand has been notified, then it becomes obligatory on the part of public service vehicles to use the stand on payment of the fee prescribed.

4. In these cases, it is seen from the records that the Regional Transport Authority has not notified the stand as a public stand and consequently has not put the notification on the notice board as required under the rules. The scheme was sent by the local authority which was

approved by the Regional Transport Authority. It is also seen that the local authority implemented the scheme and reported about its implementation. At that stage, what the Regional Transport Authority did was to approve the proposal of the panchayat by its proceedings dated 7th January, 1973. In pursuance of such approval, the second respondent, local authority, notified in the District gazette on 8th February, 1973 requiring all the bus owners to use the bus stani and to pay a fee of fifty paise per bus per day to the bus stand watchman. It may be noted that the proceedings of the Regional Transport Authority, dated 7th January, 1973 stating that the scheme has been approved is not quite correct, for, the stage of approval of the scheme has long been passed and on the report of implementation of the scheme, the Regional Transport Authority will have to proceed with the notification of the stand as a public stand. A copy of the notification under the rule shall be put up on the notice board at the office of the Regional Transport Authority. Even from the supplemental counter-affidavit it is seen that on 7th January, 1973 certain proceedings were taken by the Regional Transport Authority. The proceedings however, do not purport to be one under rule 268 (*d*) which requires that after the receipt of the report from the local authority as to when the scheme has been implemented, the Regional Transport Authority may after such enquiry or inspection as it thinks fit, notify the stand as a public stand for the particular class of public service vehicles for which the scheme was approved. All that the proceedings of the Regional Transport Authority, dated 7th January, 1973 state is that the Regional Transport Authority has approved the scheme of the local authority to have a bus stand. The proceedings stated that the Regional Transport Authority approved the scheme under "rule 268-A" which provision is not applicable. The proceedings of the Regional Transport Authority, dated 7th January, 1973, cannot be construed as one under rule 268 (*d*) which requires the Regional Transport Authority to notify the stand and which would authorise the local authority to collect fees from public service vehicles. In the affidavit, the Collector makes it clear that due to a clerical error the notification was not put on the notice-board of the Regional Transport Authority. The notification by the Regional Transport Authority of the stand as a public stand and the putting up of a copy of such a notification on the notice-board at the office of the Regional Transport Authority are necessary conditions preceding the levy of any fees from public service vehicles. This provision not having been complied with the levy of fees is not legal and the appellants cannot be proceeded with for non-payment of the fees that has been demanded by the local authority. The Regional Transport Authority will be at liberty to notify the stand as a public stand and to affix a copy of such a notification on the notice-board.

5. The Writ Appeals are allowed. It is needless to add that any prosecution on the basis that the petitioners had failed to pay the fee that was imposed in pursuance of the notification, dated 8th January, 1973, by the local authority is unsustainable. There will be no order as to costs in any of these appeals.

P.S.P. *Appeals allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail* and *S. Natarajan, JJ.*

O. Radhakrishnan and another .. *Appellants**

v.

Manickam and others .. *Respondents.*

and

S. Chettiar and others .. *Appellants*

v.

Manickam and others ... *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), *section* 65 (4) (a)—*Suit to set aside order of the Commissioner of Hindu Religious and Charitable Endowment—Scheme settled by Court—Application for amendment of scheme before Commissioner—Amendment by Commissioner—Validity—Scope of section* 65 (4) (a)—*Commissioner cannot modify scheme settled by Court.*

As the language in section 65 (4) (a) of the Tamil Nadu Hindu Religious and Charitable Endowments Act stands the Commissioner has no power to modify or cancel a scheme on an application made by any person and the power conferred on the Commissioner has to be exercised *suo motu* only. [*Para.* 11.]

The statute has expressly contemplated a particular mode for the exercise of the power by the Commissioner under section 65 (4) (a). So long as that mode has not been prescribed, the power itself is incapable of being exercised. Having regard to the language of the proviso and the object sought to be achieved by it, the prescription of conditions and restrictions is a condition precedent to the exercise of the power itself by the Commissioner. As far as the proviso to section 65 (4) (*a*) is concerned, it does not 'provide merely a mode of exercising the power, but it really constitutes a restriction or circumscription on the exercise of the power itself and, therefore, without there being the prescription therefor, the power itself is incapable of being exercised. Consequently, so long as conditions and restrictions subject to which alone the Commissioner can exercise his power have not been prescribed, the Commissioner cannot exercise the power conferred on him under section 65 (4) (*a*). [*Para.* 20]

With reference to a scheme settled or modified by a Court, it is always open to the affected parties to approach the Court for any fresh modification of the scheme. [*Para.* 30.]

Cases referred to :

Parankusam Rangacharuylu and others v. *Pernamitta Venkatanarasimhayya, Trustee of Sri Chenna Kesavaswami Temple including the minor shrine, Sri Ranganadhaswami situated at Pernamitta Village, Ongole Taluk and others,* (1949) 1 M.L.J. 200 : A.I.R. 1949 Mad. 897; *M. & S. M. Railway Co., Ltd.* v. *Municipal Council, Bezwada,* I.L.R. 1941 Mad. 897 : (1941) 2 M.L.J. 189 : A.I.R. 1941 Mad. 641 ; *M. & S. M. Railway Co., Ltd.* v. *Municipal Council, Bezwada,* 71 I.A. 113 : I.L.R. (1945) Mad. 1 : (1944) 2 M.L.J. 25 : A.I.R. 1944 P.C. 71 ; *Gujarat Electricity Board* v. *Girdharlal Motilal and another,* (1969) 1 S.C.J. 364 : (1969) 1 S.C.R. 589 : A.I.R. 1969 S.C. 267 ; *Nazir Ahmed* v. *King-Emperor,* 71 M.L.J. 476 : 44 L.W. 583 : 63 I.A 372: A.I.R. 1936 P.C. 253 (2) ; *Ballabhdas Agarwala* v. *J. C. Chakravarthy,* 1960 S.C.J. 1048 : (1960) M.L.J. (Crl.) 677: (1960) 2 S.C.R. 739 ; *Narbada Prasad* v. *Chhaganlal and others,* (1969) 1 S.C.J. 786 : (1969) 1 S.C.R. 499 : A.I.R. 1969 S.C. 395 ; *State of Gujarat* v. *Shantilal Mangaldas and others,* (1969) 2 S.C.J. 322 : (1969) 2 M.L.J. (S.C.) 59 : (1969) 2 An.W.R. (S.C.) 59: A.I.R. 1969 S.C. 634 ; *Nemi Chand* v. *Secretary of State for India,* (1907) I.L.R. 34 Cal. 511 ; *The Collector of Customs, Madras* v. *Lala Gobikissen Gokuldass,* (1955) 1 M.L.J. 422 : A.I.R. 1955 Mad. 187 : I.L.R. (1955) Mad. 1248 ; *Dargah Committee, Ajmer* v. *The State of Rajasthan and another,* (1962) 1 S.C.J. 583 : (1962) M.L.J. (Crl.) 321: (1962) 2 S.C.R. 265 ; A.I.R. 1962 S.C. 574 : *S. Murugesan* v. *The Collector of North Arcot (Inspector of Panchayats), Vellore*-cum-*Election Authority, North Arcot and others,* (1966) 2 M.L.J. 290 ; *Crawford* v. *Spooner,* (1846) 6 Moore P.C. 1 ; *Magor and St. Mellons R.D.C.* v. *Newport*

* Appeal Nos. 3 and 368 of 1967.
30*th July,* 1973.

Corporation, (1952) A.C. 189; *Gwynne* v. *Burnell*, (1840) 7 Cl. & F. 572; *Du Pont* v. *Mills, Dela*, 196 at 1.168 ; *O'Connor* v. *Isaacs*, (1956) 2 Q.B. 288 ; *Underhill* v. *Lengridge*, (1860) 29 L.J. New Series Common Law 65-66.

Appeals against the decree of the Court of the Additional Subordinate Judge, Erode, dated 7th November, 1966 and passed in Original Suit No. 114 of 1964.

R. G. Rajan, for Appellant.

K. E. Rajagopalachari, *K. Parasaran*, The Additional Government Pleader (*G. Ramaswami*), for Respondents.

The Judgment of the Court was delivered by

Ismail, J.—These two appeals arise out of the judgment and decree of the learned Additional Subordinate Judge, Erode in O.S. No. 144 of 1964. The former appeal has been preferred by defendants 8 and 4 therein, while the latter appeal has been preferred by persons who were not parties to the proceedings, but who had obtained the permission of this Court to file an appeal against that judgment.

2. The controversy relates to a Mutt called Sri Thiruvalangadu Immudi Agora Dharma Sivachariar Ayira Vysia Mutt, situate at Nerinjipettai, Bhavani Taluk, Coimbatore District. The history of this suit has been elaborately set out in the judgment of the learned Subordinate Judge of Erode, dated 24th December, 1958 in O.S. No. 155 of 1956 on his file. The plaintiffs and defendants 2 to 10 in the suit are the disciples of the said Mutt which is admittedly an ancient institution. The Deputy Commissioner, Hindu Religious and Charitable Endowments, settled a scheme for the administration of the Mutt in O.A. No. 351 of 1951. The matter was taken upon appeal to the Commissioner and then to the Subordinate Judge's Court, Erode. Finally a scheme was settled by the Subordinate Judge's Court, Erode, by judgment and decree, dated 24th December, 1958. Clauses 4 and 6 of this scheme relating to election and representation of the trustees are the important provisions as far as the present appeals are concerned. Clause 4 provided that the committee of trustees shall consist of 12 persons elected from among the disciples residing in the Districts of the Madras State, and of the trustees so elected, one each should represent those residing in each of the eleven districts, and the City of Madras as per Schedule A to the scheme. This clause further provided that should there be no representation from a particular district, the orders of the Commissioner under Hindu Religious and Charitable Endowments Act should be taken as to whether an additional trustee might be selected from another district within three months from the election of the other trustees. Clause 6 provided that the committee of trustees shall be elected at a General Body meeting of the disciples convened at Nerinjipet specially for this purpose and all the disciples shall be entitled to participate and vote at the election of trustees. Subsequent to the settlement of this scheme by the Subordinate Judge's Court on 24th December, 1958, trustees were elected in accordance with the scheme and after the expiry of their term of five years, fresh trustees were to be elected on 25th December, 1964, as per the publication made by the managing trustee. Defendants 2 to 16 in the present suit filed an application, O.A. No. 2 of 1964 before the Commissioner, Hindu Religious and Charitable Endowments, for modification of clause 6. The purport of the modification was that instead of the entire body of disciples meeting at a particular place and electing all the 12 trustees, the disciples of the mutt residing in each district shall separately elect one trustee for the district. The Commissioner, Hindu Religious and Charitable Endowments, by his order, dated 11th August, 1964 in C.A. No. 2 of 1964 allowed this amendment. It is to set aside this order of the Commissioner that the present suit was instituted by four plaintiffs in a representative capacity representing all the disciples of the first defendant mutt. Their case, as put forward in the plaint, was that the order of the Commissioner was liable to be set aside on the ground that it was without jurisdiction and that it had been passed without giving notice to and without hearing all those disciples who were interested in the mutt. They also put forward the contention that the amendment prayed for and ordered by the Commissioner

will have the effect of producing a spirit of parochialism in the administration of the mutt. However, defendants 2 to 16 in the suit contested this position and put forward the contention that the amendment was in the interests of the institution and was validly made. The 17th defendant in the suit, namely, the Commissioner, Hindu Religious and Charitable Endowments, Madras, who passed the impugned order was subsequently impleaded as a party. He merely stated that he had jurisdiction to pass the order and that he passed the order after complying with all the requirements prescribed by the Act and the rules made thereunder. In view of these contentions of the parties, the trial Court framed the following issues :—

(1) Whether clause 6 of the scheme modified by the Commissioner, Hindu Religious and Charitable Endowments (Administration) is liable to be set aside by this Court ?

(2) Whether the modification made by the Commissioner causes irreparable loss or damage to the plaintiff ?

(3) Whether the said modification affects the fundamental rights of the disciples of the mutt ?

(4) Whether the said modification is *ultra vires* of the powers of the Commissioner ?

(5) Whether the Commissioner, Hindu Religious and Charitable Endowments (Administration) is a necessary party ?

(6) Whether the suit as framed is not maintainable ?

(7) To what relief is the plaintiff entitled ?

The following additional issue was framed on 8th February, 1966 :

(1) Whether plaintiffs are entitled to sue in representative capacity ?

The trial Court held that the Commissioner had the power to amend the scheme and that therefore the change ordered by the Commissioner cannot be said to be *ultra vires* the powers of the Commissioner. However, he decreed the suit and set aside the order of the Commissioner on two grounds. One was that there was absolutely no evidence to show that the Commissioner passed the impugned order after giving notice to all the disciples of the mutt who were interested in the administration of the mutt. He also accepted the case of the plaintiffs in the suit that the amendment would introduce a spirit of parochialism and instead of promoting integration, it will actually lead to disintegration. In view of this conclusion, the learned Additional Subordinate Judge, on 7th November, 1966 decreed O.S. No. 144 of 1964 and set aside the order of the Commissioner referred to already. It is against this judgment and decree of the lower Additional Subordinate Judge the present two appeals have been preferred as pointed out already.

3. We are clearly of the opinion that the appeals have to be dismissed. As we have pointed out already, one of the points urged before the learned Additional Subordinate Judge was that the order of the Commissioner was *ultra vires* his powers; in other words, the Commissioner had no jurisdiction to pass the order in question. While agreeing with the conclusion of the learned Additional Subordinate Judge that the impugned order of the Commissioner has to be set aside as it was passed without giving any opportunity whatever to the affected parties, we are further of the view that the Commissioner had no jurisdiction whatever to pass the impugned order in question and the learned Subordinate Judge really erred in holding that the Commissioner had the jurisdiction. We have come to this conclusion for three different reasons. Each one of them is adequate to nullify the order of the Commissioner.

4. Before we indicate our reasons for the conclusion we have arrived it is desirable to set out the relevant statutory provisions themselves. Section 64 of the Tamil Nadu Hindu Religious Charitable and Endowments Act (XXII of 1959) hereinafter referred to as the Act provides for settlement of schemes and modification or cancellation of schemes by the Deputy Commissioner in respect of a temple or a specific endowment attached to a temple. Similarly section 65 of the

Act provides for settlement or modification or cancellation of schemes by the Commissioner in respect of a mutt or a specific endowment attached to a mutt. Section 65 (1) which deals with the settlement of a scheme for the first time by the Commissioner is as follows :—

"65 (1). When the Commissioner has reason to believe that in the interests of the proper administration of a math or a specific endowment attached to a math, a scheme should be settled for the math or the specific endowment attached to a math or when not less than five persons having interest make an application in writing, stating that in the interests of the proper administration of the math or the specific endowment attached to the math, a scheme should be settled for it, the Commissioner shall consult in the prescribed manner the trustee and the persons having interest, and if, after such consultation, he is satisfied that it is necessary or desirable to do so, he shall by order, settle a scheme of administration for the math or the specific endowment attached to the math."

Section 65 (4) (*a*) of the Act deals with the cancellation or modification of a scheme and it is this power the Commissioner has purported to exercise in the present case. Section 65 (4) (*a*) along with the proviso is as follows :—

"65 (4) (*a*).—The Commissioner may, at any time after consulting the trustee by order, modify or cancel any scheme in respect of a math or a specific endowment attached to a math and in force and settled under sub-section (1) or any scheme in force settled or modified by the Board under the Madras Hindu Religious Endowments Act, 1926 (Madras Act II of 1927), or deemed to have been settled under that Act or any scheme in force settled or modified by the Commissioner under this Act or any scheme in force settled or modified by the Court in a suit under sub-section (1) of section 70 or an appeal under sub-section (2) of that section or any such scheme in force deemed to have been settled or modified by the Court under clause (*a*) of sub-section (2) of section 118: Provided that such cancellation or modification of a scheme in force settled or modified by the Court in a suit under sub-section (1) of section 70 or on an appeal under sub-section (2) of that section or of a scheme in force deemed to have been settled or modified by the Court under clause (*a*) of sub-section (2) of section 118 shall be made only subject to such conditions and restrictions as may be prescribed."

5. With reference to these statutory provisions, rules have been framed by the Government by G. O. No. 4851, Revenue, dated 26th November, 1960. Rule 2 deals with the procedure to be followed by the Deputy Commissioner under section 64 of the Act. Rule 3 also applies to the same case. Rules 5 and 6 alone are relevant in this context, with reference to the power of the Commissioner under section 65 of the Act. The said rules are as follows :—

"5. The consultation required under sub-sections (1), 4 (*a*) and 4 (*b*) of section 65 shall be made in the following manner :—

(*a*) When the Commissioner proposes on his own motion to take action under sub-section (1) or 4 (*a*) or 4 (*b*) of section 65 or where an application under sub-section (1) is received by him, he shall give notice of his proposal or of the application, as the case may be, to the trustee or the trustees and the persons having interest calling upon them to submit any representations they may wish to make before a date to be specified in such notice which shall not be less than two months from the date of its issue.

(*b*) If, after considering the objections or suggestions, if any, received by him, he has reason to believe that a scheme should be settled, modified or cancelled, he shall give notice to the trustee or the trustees and the persons having interest, of his intention to settle, modify or cancel a scheme of administration for the math or a specific endowment attached to a math and call upon them to submit in

writing any objections or suggestions they may wish to make before the date specified in such notice for an enquiry.

(*c*) The notice under sub-rules (*a*) and (*b*) shall be sent by registered post to the trustee or the trustees concerned. A copy of the notice shall be affixed on the notice board or front door of the math and in the case of a specific endowment attached to a math on the notice board or front door of the math to which the specific endowment is attached, on the notice board of the office of the Deputy Commissioner and on the notice board of the office of the Assistant Commissioner, within whose division the math is situate, and on the notice board of the municipal council including the Corporation of Madras or village chavadi concerned. Such affixture shall be deemed to be sufficient intimation to persons having interest. All representations submitted in time by the trustee or the trustees and the persons having interest shall be taken into consideration by the Commissioner in settling, modifying or cancelling the scheme."

6. While considering the modification or cancellation of a scheme in force settled or modified by the Court in a suit under sub-section (1) of section 70 or on an appeal under sub-section (2) of that section or of a scheme in force deemed to have been settled or modified by the Court under clause (*a*) of sub-section (2) of section 118, the Commissioner shall give notice of the modifications or reasons for the cancellation proposed by him to the trustee or the trustees and the persons having interest calling upon them to submit any representations they may wish to make before a date to be specified in such notice which shall not be less than two months."

A scrutiny of the language of the statutory provisions will clearly show that the Commissioner has no power to pass the impugned order for the following reasons :

(1) Clause (*a*) of sub-section (4) of section 65 does not enable the Commissioner to take action under that section on the application of any particular party.

(2) The proviso to section 65 (4) (*a*) contemplates the Commissioner exercising his powers under clause (*a*) of sub-section (4) of section 65 only subject to such conditions and restrictions as may be prescribed by the Government and in this case admittedly to such conditions and restrictions have been prescribed by the Government and therefore the Commissioner is incapable of exercising his powers under clause (*a*) of sub-section (4) of section 65 in respect of a scheme covered by the said proviso in the absence of any such conditions and restrictions prescribed by the Government.

(3) As the language of clause (*a*) of sub-section (4) of section 6 stands, the Commissioner has no power to modify a scheme settled by a Court under the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951).

7. As we have pointed out already, any one of the above grounds will be sufficient to invalidate and nullify the impugned order passed by the Commissioner, since each one of them goes to the root of the jurisdiction of the Commissioner. As far as the first ground is concerned, the contrast between the language of section 65 (1) and section 65 (4) (*a*) will clearly show that either deliberately or by oversight no provision whatever has been made in clause (*a*) of sub-section (4) of section 65 for the Commissioner taking action on an application of a particular party. Mr. R. C. Rajan, learned Counsel for the appellants, repeatedly contended that whenever power has been conferred in as wide terms as has been done in clause (*a*) of sub-section (4) of section 65, it is reasonable to construe the provision so as to imply that the Commissioner can act either *suo motu* or on application of parties. We are unable to accept this argument for more than one reason. If the power of the Commissioner has been expressed in wide terms in an independent provision, there may be some scope for the advancement of this argument. As a matter of fact, in this very Act itself there

are other provisions from which such a power can be inferred. There is section 21 of the Act conferring on the Commissioner the power of superintendence. Sub-section (1) of that section states:

> "The Commissioner may call for and examine the record of any Deputy or Assistant Commissioner, of any Area Committee, or of any trustee of a religious institution other than a math or a specific endowment attached to a math in respect of any proceeding under this Act (not being a proceeding in respect of which a suit or an appeal to a Court is provided by this Act), to satisfy himself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein."

The power has been couched in the most general terms as is generally done with regard to an authority who exercises general powers of superintendence. Consequently, simply as a matter of construction, though sub-section (1) of section 21 of the Act does not expressly state whether the power should be exercised *suo motu* or on application it can be easily held that the power can be exercised in both the contingencies. That is made clear by sub-section (7) of that section itself which states that every application to the Commissioner for the exercise of his powers under this section shall be preferred within three months from the date on which the order or proceeding to which the application relates was communicated to the applicant. Similar is the language contained in section 114 of the Act dealing with the power of the Government to call for and examine the record of the Commissioner or any Deputy Commissioner or Assistant Commissioner or any trustee for the purpose of satisfying itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein. In these provisions the statute itself has used different language, when a wide power of superintendence has been conferred on a designated authority and the manner of exercise of that power has to be inferred from the width of the language itself. Notwithstanding the wide language, each one of the above two sections actually and expressly refers to the concerned authority exercising his power, also an application made by parties.

8. As against this, the contrast between the language in section 65 (1) and 65 (4) (*a*) is significant. In section 65 (1), the statute expressly contemplates not less than five persons having interest in the math or the specific endowment attached to a math making an application in writing stating that in the interests of the proper administration of the math or the specific endowment attached to the math, a scheme should be settled for it. On the other hand, as far as clause (*a*) of sub-section (4) of section 65 is concerned, a similar provision is absent. In view of this contrast between sub-section (1) and clause (*a*) of sub-section (4) occurring in the same section, it is not possible for us to hold that the power under the latter provision can be exercised on application by somebody else. Even assuming that it is open to us to construe the scope of the power in clause (*a*) of sub-section (4) of section 65 as one capable of being exercised either *suo motu* or on application, a question may possibly arise, as to by whom an application should be made. Are we to import wholesale into clause (*a*) of sub-section (4), the provision contained in sub-section (1), namely, that an application should be made by not less than five persons having interest in the institution concerned? In the absence of a specific provision to that effect, we are unable to introduce into clause (*a*) of sub-section (4) of section 65, the contingency as well as the restriction contemplated in sub-section (1) of section 65. It may be that if the attention of the Legislature was drawn to this aspect, the Legislature might have made a different provision is clause (*a*) of sub-section (4) of section 65. It might have insisted on an application being made by not less than five persons having interest in the institution or it might have provided that an application for cancellation or modification of a scheme as distinct from the one for settlement of a scheme, should be made by any person interested in the math or the specific endowment attached to the math. In the absence of express provision, it will not be open to

the Court to speculate upon as to what provision the Legislature should have made, if the attention of the legislature was drawn to this aspect of the matter.

9. Mr. R. G. Rajan drew our attention to the schedule contained in the Act relating to the Court-fee payable under the Act with reference to section 104 of the Act. The relevant entry in this schedule is as follows :

Section	*Description of document*	*Proper fee*
"65 (4)(*a*)	Application to modify or cancel scheme settled under section 65 (1) or deemed to have been so settled.	Rs. 25."

From this Mr. Rajan wanted us to infer that the Legislature contemplated an application under section 65 (4) (*a*) of the Act. We are unable to accept this argument. Simply because the schedule included an entry as referred to above, on the assumption that the Legislature has already provided for in section 65 (4) (*a*) of the Act for the Commissioner exercising his power on an application, we cannot come to the conclusion that section 65 (4) (*a*) itself confers power on the Commissioner to take action on application. We have already indicated that one great difficulty in accepting this argument will be as to the competency or eligibility of the persons who can prefer such an application under section 65 (4) (*a*) of the Act. As a matter of fact, the entry immediately preceding the above entry in the schedule is one relating to section 65 (1) and it is as follows :

Section	*Description of document*	*Proper fee*
"65 (1)	Application for settlement of scheme by the Commissioner.	Rs. 50."

This entry provides for payment of Court-fee of Rs. 50 while the entry relating to section 65 (4) (*a*) provides for payment of Court-fee of Rs. 25. Consequently, with reference to these two entries, it is clear that the Legislature itself intended to treat these two differently and not on the same footing. This is yet another reason for not importing wholesale into clause (*a*) of sub-section (4) of section 65, the provisions contained in sub-section (1) of section 65 of the Act.

10. As against this, we can also see that the rules referred to already merely proceed on the basis of there being no provision for anybody applying under section 65 (4) (*a*) of the Act. The very language of the rules refers to an application only under section 65 (1) and not to an application under section 65 (4) (*a*) of the Act, even though the rules cover the matters dealt with under section 65 (1) as well as under section 65 (4) of the Act. We may also point out in this connection that rule 6 which we have extracted corresponds to rule 3 dealing with proceedings before the Deputy Commissioner under section 64 of the Act, and the said rule, whether it is rule 6 or rule 3, is really redundant and does not serve any purpose, whatever. Except for referring to a scheme settled or modified by a Court, these rules do not make any provision other than what is already contained in rules 5 and 2 respectively. However, that is beside the point.

11. For the reasons indicated by us, we are of the opinion that as the, languaae in clause (*a*) of sub section (4) of section 65 stands, the Commissioner has no power to modify or cancel a scheme on an application made by any person and the power conferred on th Commissioner has to be exercised *suo motu* only.

12. As far as the second ground is concerned, that flows directly from the proviso to clause (*a*) of sub-section (4) of section 65 which we have already extracted. The said proviso expressly states that the cancellation or modification shall be made only subject to such conditions and restrictions as may be prescribed. We are clearly of the opinion that the use of the word, "only" has qualified and restricted the exercise of the power by the Commissioner and consequently so long as conditions and restrictions are not prescribed, the Commissioner cannot exercise the power. One of the meanings of the word, "only" as contained in the Shorter Oxford English Dictionary is, "as opposed to any other" and that meaning alone is relevant in the present context. If that is so, so long as such conditions or res-

trictions have not been prescribed by the Government, the Commissioner cannot exercise the power conferred on him under clause (a) of sub section (4) of section 65. This specific provision contained in the enactment is easily understandable. The Commissioner is a creature of the statute and he is exercising the powers and functions conferred upon him. Section 9 of the Act deals with the appointment of the Commissioner. Clause (a) of sub-section (2) of that section provides that the appointment to the post of Commissioner shall be (i) by transfer from among the members of the Madras State Higher Judicial Service or of the Madras State Judicial Service or of any other service, or (ii) by promotion from Deputy Commissioner, or (iii) by direct recruitment. Similarly, clause (b) of sub-section (2) deals with the appointment of Deputy Commissioners and it provides that the appointment to the post of Deputy Commissioner shall be (i) by transfer from among the members of the Madras State Judicial Service or of any other service, or (ii) by promotion from Assistant Commissioners, or (iii) by direct recruitment, or (iv) by agreement or contract. We are referring to the appointment of Deputy Commissioner for the simple reason that under section 64, the Deputy Commissioner is exercising the very same powers with reference to a temple and a specific endowment attached to a temple, as the Commissioner is exercising powers under section 65 with reference to a math or specific endowment attached to a math. Consequently, in the statutory provisions themselves, there is no minimum qualification prescribed for the Commissioner or the Deputy Commissioner. Under these circumstances, it is natural for the Legislature to be anxious about the exercise of the powers of the Commissioner and the Deputy Commissioner in respect of schemes settled or modified by the Court, being controlled and guided. Schemes settled or modified by a Court may mean any scheme settled by a subordinate Court upto the Supreme Court , which is the highest Court in the country. It could not have been in the contemplation of the Legislature to give a *carte blanche* to a Commissioner or Deputy Commissioner under the Act to deal with a scheme settled by such a Court in any manner he pleases. As a matter of fact, the power conferred by clause (a) of sub-section (4) of section 65 not merely deals with the power to modify a scheme but even to cancel a scheme. The exercise of the power to cancel a scheme settled by a Court will amount to the reversal of a decree of the Court itself. The Legislature could not have lightly contemplated an officer functioning under the Act reversing a decree of the highest Court of the land and it is in view of this alone, the Legislature has provided for specific restrictions and guidelines for the exercise of the power by the Commissioner with reference to a scheme settled by a Court to be prescribed by indicating the circumstances under which alone the Commissioner will be justified in either modifying or cancelling a scheme settled or modified by a Court. That we are pointing out with regard to the Commissioner will apply to the Deputy Commissioner also under section 64 (5) (a) of the Act. Therefore, we are clearly of the opinion that it was the definite intention of the Legislature that the power of the Commissioner under section 65 (4) (a) of the Act should be a restricted power and should not be an unguided power and that power can be exercised only under the conditions and restrictions prescribed by the Government which would certainly take note of the fact that the Commissioner may be dealing with or interfering with a scheme settled by the highest Court of the land. Therefore, simply as a matter of construction of the specific statutory provision contained in the Act, against the background indicated above, we have come to the conclusion that the power conferred upon the Commissioner having regard to the proviso to section 65 (4) (a) , cannot be exercised by him, unless conditions and restrictions have been prescribed in this behalf for the purpose in question. We are fortified in our conclusion by certain decided cases as well.

13. The decision in *Parankusam Rangacharyulu and others* v. *Pernamitta Venkatanarasimhayya, Trustee of Sri Chenna Kesavaswami Temple including the minor shrine Sri*

Ranganadha swami situated at Pernamitta Village, Ongole Taluk and others[1] dealt with a case falling within the scope of section 78 of the Madras Hindu Religious Endowments Act (II of 1927). That section provided for a trustee approaching the Court for recovery of possession of the properties belonging to the temple and the applicant for the purpose producing an order of appointment. Where the application is for possession of the property, he will have to produce a certificate issued by the Hindu Religious and Charitable Endowments Board in such manner as may be prescribed setting forth that the property in question belongs to the math, temple or specific endowment concerned. In the case which came up before this Court, the Government who had to prescribe the form of the certificate, had not made rules prescribing the said form. Consequently, the Board gave its certificate on a form evolved by itself and when the trustee applied for delivery of possession on production of such a certificate, this Court came to the conclusion that the power of the Board to grant a certificate could not be exercised without the form being prescribed therefor. The Bench of this Court held :

> "The Board has no power of issuing a certificate by itself either under this section or any other provision of the Act. The power is to issue a certificate in the manner as may be prescribed and not the power to issue a certificate, the form of which may or may not be prescribed by the Government. The non-exercise of the power of prescribing the form by the provincial Government would not confer such power upon the Board as was contended on behalf of the respondents. The Board has no rule making power and cannot prescribe the form. No hardship is caused by the delay on the part of the Provincial Government in framing the rules, as it is open to the trustees to recover possession by suit instead of an application under section 78."

1. (1949) 1 M.L.J. 200: A.I.R. 1949 Mad. 897.

The Bench itself considered a decision of this Court in *M. and S. M. Railway Company Limited* v. *Municipal Council, Bezwada*[1], and the judgment of the Privy Council on appeal therefrom in *M. and S. M. Railway Company Limited* v *Municipal Council, Bezwada*[2] and distinguished the same from the case before them.

14. The decision of the Supreme Court in *Gujarat Electricity Board* v. *Girdharlal Motilal and another*[3] dealt with the scope of section 6 (1) (*a*) of the Electricity Act, 1910 as amended in 1959. That section provided:

> "Where a license has been granted to any person not being a local authority, the State Electricity Board shall—
>
> (*a*) in the case of a license granted before the commencement of the Indian Electricity (Amendment) Act, 1959 on the expiration of each such period as is specified in the licence.......... have the option of purchasing the undertaking and such option shall be exercised by the State Electricity Board serving upon the licensee a notice in writing of not less than one year requiring the licensee to sell the undertaking to it at the expiry of the relevant period referred to in this subsection."

In that particular case, the notice issued by the State Electricity Board was in the following terms :

> "Dear Sir,
>
> In exercise of the powers conferred on the Gujarat Electricity Board by virtue of section 71 of the Electricity (Supply) Act, 1948, read together with section 6 of the Indian Electricity Act, 1910, as amended by the Indian Electricity (Amendment) Act, 1959

1. I.L.R. (1941) Mad. 897 : (1941) 2 M.L.J 189 : A.I.R. 1941 Mad. 641.
2. 71 I.A. 113 : I.L.R. (1945) Mad. 1 : (1944) 2 M.L.J. 25: A.I.R. 1944 P.C. 71.
3. (1969) 1 S.C.J. 364: (1969) 1 S.C.R. 589: A.I.R. 1969 S.C. 267.

(XXXII of 1959) this is to give you notice that the Gujarat Electricity Board has decided to exercise and shall exercise the option of purchasing your undertaking on 3rd January, 1963, the date on which the license granted to you by the Government of Baroda expires. The receipt of this notice may please be acknowledged.

Yours faithfully,

Sd. Secretary the Gujarat Electricity Board."

The Supreme Court held :

These provisions confer a power on the State Electricity Board to purchase the property of the licensee but that right can be exercised only in the manner provided in the Act and not in any other way. It must be remembered that the provisions in question empower the State Electricity Board to interfere with the property rights of the licensee. Therefore such a power will have to be strictly construed. The legislature has prescribed a mode for the exercising of that power and hence that power can be exercised only in that manner and in no other manner. See *Nazir Ahmad* v. *King Emperor*[1], and *Ballabhdas Agarwala* v. *J. C. Chakravarty*[2]. Before the option to purchase the undertaking can be exercised, the State Electricity Board must call upon the licensee by means of a notice in writing within the period mentioned in section 6 (1) to sell the undertaking to it on the expiration of the period for which license was given.

" The impugned notice does not require the licensee to sell the undertaking. It merely notifies the respondent that the appellant Board has decided to exercise and shall exercise the option of purchasing the respondents' undertaking on 3rd January,1963, the date on which the licence granted to him by the Government of Baroda expired."

The decision of the Supreme Court in *Narbada Prasad* v. *Chhaganlal and others*[3], dealt with the provisions contained in section 33 (5) of the Representation of the People Act, 1951. That section required that where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny. In that case the candidate did not produce a copy of the electoral roll of that constituency on the date of the nomination; nor did he produce a copy on the date of scrutiny. However, he produced a certificate from an officer, who it is not proved to the satisfaction of the Court, had the authority to issue a certified copy of the electoral roll. He also added an affidavit of his own, in which the gist of the entry was given. The Supreme Court held that there was no compliance with the provision of section 33 (5) of the Representation of the People Act and there was no power in the Court to dispense with this requirement. In that context, the Supreme Court observed :

" It is a well-understood rule of law that if a thing is to be done in a particular manner it must be done in that manner or not at all. Other modes of compliance are excluded."

The same view is reiterated by the Supreme Court in *State of Gujarat* v. *Shantilal Mangaldas and others*[1], wherein it stated that it is a settled rule of interpretation of statutes that when power is given under a statute to do a certain thing in a certain way the thing must be done in that way or not at all.

15. On the other side, there are certain decisions.

16. *Nemi Chand* v. *Secretary of State for India*[2], dealt with the scope of the power Collector of Customs to detain goods imported contrary to the provisions of the Customs Act. The argument that was advanced before the Court was that

1. 71 M.L.J. 476 : 44 L.W. 583 : 63 I.A. 372: A.I.R. 1936 P.C. 253 (2).
2. 1960 S.C.J. 1048 : (1960) M.L.J. (Crl.) 677 : (1960) 2 S.C.R. 739 : A.I.R. 1960 S.C. 576.
3. (1969) 1 S.C.J. 786 : (1969) 1 S.C.R. 499: A.I.R. 1949 S.C. 395.

1. (1969) 2 S.C.J. 322: (1969) 2 M.L.J. (S.C.) 59 : (1969) 2 An.W.R. (S.C.) 59 : A.I.R. 1969 S.C. 634.
2. (1907) I.L.R. 34 Cal. 511.

the Collector had no power to detain the goods, as no regulations had been framed by the Governor-General in Council under sub-section (2) of section 19-A of the Act. The learned Judges held that the power of detention was clearly implied by section 19-A of the Act, apart from the positive words of section 18 that no goods of the class specified were to be brought into British India and that consequently the enabling power given to the Governor-General-in-Council to frame regulations cannot override the prohibiting language of section 18 or the implied power of detention under section 19-A.

17. To the same effect, with regard to the same provisions, is the observation of this Court in the *Collector of Customs Madras* v. *Lala Gopikissen Gokuldass*[1]. The learned Judges stated:

> "It is admitted that no regulations have been framed under this enactment touching the manner of and procedure for confiscation and the argument of Mr. Gopalaratnam is that the power conferred by sections 19, 167 (8) and 183 of the Act cannot be exercised except in conformity with the regulations to be framed and in their absence cannot be exercised at all. We are unable to accept this contention. The power in section 19-A (*a*) is an enabling power and the framing of the regulations cannot be read as a condition precedent to bringing into operation the powers and authority of the Customs Officers under sections 19, 167 (8) and 183. Of course if regulations have been framed the detention and confiscation would have to be effected in conformity with them but it is not as if these regulations bring into operation the power to detain or to confiscate if there is a violation of an import control notification."

18. The Supreme Court in the *Dargah Committee, Ajmer* v. *The State of Rajasthan and another*[2], had to deal with a similar argument, with reference to the provisions contained in section 234 of Ajmer Merwara Municipalities Regulation, 1925. The point is dealt with in paragraph 7 of the judgment and from that it appears that rules had not been framed under the Regulations and so no form had been prescribed for making a demand under section 222 (1). The argument before the Supreme Court was that the proceedings under section 234 taken against the appellant therein were incompetent because a demand had not been made by the second respondent on the appellant in the manner prescribed by rule as required by section 234 and unless rules were framed and the form of notice was prescribed for making a demand under section 222 (1) no demand can be said to have been made in the manner prescribed by rules and so an application cannot be made under section 234. The Court held that if the rules are not prescribed then all that can be said is that there is no form prescribed for issuing a demand notice and that does not mean that the statutory power conferred on the Committee by section 222 (1) to make a demand is unenforceable. The exact language of the relevant provisions is not extracted in the judgment of the Court.

19. The last of the decisions to which our attention was drawn is that of a Bench of this Court in *S. Murugesan* v. *The Collector of North Arcot* (*Inspector of Panchayat*), *Vellore*-cum-*Election authority, North Arcot and others*[1]. That decision dealt with a case under section 16 of the Madras Panchayats Act, 1958, which was as follows:

> "For the purpose of electing members to a panchayat, the Inspector shall after consulting the panchayat, if any, by notification, divide the village or town into wards and determine the number of members to be returned by each ward in accordance with such scale as may be prescribed."

In that case the argument was that since no rules were framed prescribing the scale for the representation of the wards, the Inspector could not exercise his power at

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1. (1955) 1 M.L.J. 422: I.L.R. (1955) Mad. 1248 : A.I.R. 1955 Mad. 187.
2. (1962) 1 S.C.J. 583 : (1962) M.L.J. (Crl.) 321 : (1962) 2 S.C.R. 265 : A.I.R. 1962 S.C. 574.

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1. (1966) 2 M.L.J. 290.

call, for dividing the village or town into wards and determining the number of members to be returned by each ward. This Court held that the power is an enabling one and the fact that the Government had not framed any rule did not take away the power the Inspector had under the specific provisions contained in the Act.

20. In our opinion, as far as the present case is concerned, the statute has expressly contemplated a particular mode for the exercise of the power by the Commissioner under section 65 (4) (*a*). So long as that mode has not been prescribed, the power itself is incapable of being exercised. Having regard to the language of the proviso and the object sought to be achieved by it, we are of the opinion that the prescription of conditions and restrictions is a condition precedent to the exercise of the power itself by the Commissioner. As a matter of fact, we may go a step further and state that as far as the proviso to clause (*a*) of sub-section (4) of section 65 is concerned, it does not provide merely a mode of exercising the power, but it really constitutes a restriction or circumscription on the exercise of the power itself and therefore without there being the prescription therefor the power itself is incapable of being exercised. Consequently, we are of the opinion that so long as conditions and restrictions subject to which alone the Commissioner can exercise his power have not been prescribed, the Commissioner cannot exercise the power conferred on him under clause (*a*) of sub-section (4) of section 65 of the Act.

21. As far as the third ground is concerned, we shall have now to extract clause (*a*) of section 118 (2) of the Act which is as follows :

> " 118 (2) (*a*). Notwithstanding the repeal of the said Act by the Hindu Religious and Charitable Endowments Act, 1951 by sub-section (1), all rules made, or deemed to have been made, notifications or certificates issued or deemed to have been issued, orders passed or deemed to have been passed, decisions made or deemed to have been made, proceedings or action taken or deemed to have been taken, schemes settled or deemed to have been settled and things done or deemed to have been done by the Government, the Commissioner, a Deputy Commissioner, an Area Committee or an Assistant Commissioner under the said Act, shall, in so far as they are not inconsistent with this Act, be deemed to have been made, issued, passed, taken, settled or done by the appropriate authority under the corresponding provisions of this Act, and shall have effect accordingly."

It will be seen immediately that clause (*a*) of section 118 (2) makes elaborate provisions with regard to the rules, notifications, certificates, orders, decisions, proceedings, and schemes that were made, issued, passed, taken, or settled under the provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951. The most significant thing to be noticed in clause (*a*) of section 118 (2) is that it makes no reference whatever to schemes settled or deemed to have been settled by a Court. However, under an erroneous assumption that section 118 (2) (*a*) dealt with schemes settled or modified or deemed to have been settled or modified by a Court, section 65 (4) (*a*) proceeded to confer power on the Commissioner to cancel or modify such scheme itself. A reading of section 65 (4) (*a*) will give an impression that the Legislature assumed that section 118 (2) (*a*) dealt with a scheme settled or modified by a Court. On the other hand, actually section 118 (2) (*a*) does not deal with a scheme settled or modified by a Court at all. Under such circumstances, the question for consideration is, whether it is open to this Court to supply the omission which the Legislature has made in section 118 (2) (*a*) of the Act. We are clearly of the opinion that it is not open to this Court to supply the omission and thereby hold that the Commissioner has got power to cancel or modify even a scheme settled or modified by a Court under the earlier Act.

22. The general rule of construction in this behalf has been stated by Maxwell on the Interpretation of Statutes, Twelfth Edition, at page 33 as follows :

> " It is corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to

justify the inference that the legislature intended something which it omitted to express. Lord Mersey said : 'It is a wrong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.' 'We are not entitled', said Lord Loreburn, L.C., 'to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.' A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission appears in consequence to have been unintentional."

The following passage in Craies on Statute Law, Seventh Edition, at pages 70-71, will indicate the position in greater detail:

> "The Judges may not wrest the language of Parliament even to avoid an obvious mischief ....
> In *Crawford* v. *Spooner*[1], the Judicial Committee said :
>
> 'We cannot aid the legislature's defective phrasing of an Act, we cannot add and amend, and, by construction, make up deficiencies which are left there.' In 1951, in *Magor and St. Mellons R.D.C* v. *Newport Corporation*[2] it was held by the House of Lords that a Court has no power to fill any gaps disclosed in an Act. To do so would be to usurp the function of the legislature.
>
> 23. In other words, the language of Acts of Parliament, and more especially of modern Acts, must neither be extended beyond its natural and proper limits, in order to supply omissions or defects, nor strained to meet the justice of an individual case. 'If', said Lord Brougham, in *Gwynne* v. *Burnell*[3], we depart from the plain and obvious meaning on account of such views (as those pressed in argument on 43 Geo., 3 c. 99), we do not in truth construe the Act, but alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it. This becomes peculiarly improper in dealing with a modern statute, because the extreme conciseness of the ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words by the Judges. The prolixity of modern statutes, so very remarkable of late, affords no grounds to justify such a sort of interpretation.'"

1. (1846) 6 Moore P. C. 1.
2. (1952) A.C. 189.
3. (1840) Cl. & F. 572.

24. Referring to the decision in *Du Pont* v. *Mills*[1], Crawford on Statutory Construction, 1940 Edition, at page 272 states the rule in the following terms :

> "While the Court may interpret doubtful or obscure phrases and obscure language in a statute so as to give effect to the presumed intention of the legislature, and to carry out what appears to be the general policy of the law, it cannot, by construction, cure a *casus omissus*, however just and desirable it may be to supply the omitted provision; and it will make no difference if it appears that the omission on the part of the legislature was a mere oversight, and that, without doubt, the Act would have been drawn otherwise, if the attention of the legislature had been drawn to the oversight at the time the Act was under discussion."

25. In our opinion, the above general principles clearly lead us to hold that it is not open to this Court to supply the omission in section 118 (2) (*a*) of the Act so as to give effect to what is found in section 65 (4) (*a*) of the Act. As a matter of fact, a striking illustration similar to the one in the present case has been noticed by Maxwell himself at page 34 (Maxwell on Interpretation of Statutes — Twelfth Edition in the following passage :

> "Section 11 of the Habitual Criminals Act, 1869, in enacting that upon a trial for receiving stolen goods a previous conviction for any offence involving dishonesty should be admissible against the prisoner as evidence of his having received with guilty knowledge, provided that notice were given to him that the conviction would be put in evidence and that he would be deemed to have known that the goods were stolen until he proved the contrary,' omitted, how-

1. Dela 196 at 1.168.

ever, to enact substantively that this effect should be given to the conviction. It was held that the omission could not be supplied."

The Court of Appeal in *O'Conner* v. *Isaacs*[1] was considering the provisions contained in section 2 of the Justices Protection Act, 1848. The proviso to that section was :

"Provided nevertheless, that no such action shall be brought for any thing done under such conviction or order until after such conviction shall have been quashed, either upon appeal, or upon application to Her Majesty's Court of Queen's Bench."

26. It will be noticed that the words, ' or order ' do not find a place after the word ' conviction ', when that word is used for the second time. An argument was advanced before the Court of Appeal that the Court must presume that the legislature intended to include the words, ' or order ' after the word, ' conviction for the second time also' and in support of that argument, three reasons were strongly pressed on the Court. The first was, later in the section there appeared the words ' until after such conviction or order shall have been so quashed as aforesaid ", consequently the legislature must be deemed to have intended to use the words, ' or order ' after the word, ' conviction ' in this place also. The second argument was, the section read very strangely if the words, ' or order ' were not inserted after ' conviction ' in the only place in the section in which they were not found together. The third argument was, when a similar act was passed for Ireland in 1849, the section included the words ' or order ' in the relevant place. However, the Court of Appeal rejected all these contentions and refused to supply the omission.

27. In *Underhill* v. *Longridge*[2], the Court declined to supply certain words by implication. The case turned on section 9 of Coal Mines Act of 1855, which enacted that if loss of life to any person employed in a coal mine occurs by reason of any accident within such coal mine, or if any serious personal injury arises from explosion therein, the owner of such mine shall, within twenty-four hours next after such loss of life, send notice of such accident etc., or be liable to a penalty. An accident having occurred which caused serious personal injury, but no loss of life, it was contended that the owner of the mine ought not to have sent a notice of the accident, for it was argued that it was quite clear that there was an accidental omission after the words ' such loss of life ', and that the legislature must have intended to insert the words ' or such serious personal injury ', otherwise the words ' or if any serious personal injury arises from explosion therein ' were wholly inoperative. The Court, however, declined to imply that these words had been omitted by accident and the Court stated, " we cannot take upon ourselves the office of the legislature."

28. Under these circumstances, we are clearly of the opinion that even if the omission to include a scheme settled by Court in section 118 (2) (*a*) of the Act was by oversight, we cannot supply that omission and that is a defect for the legisature to rectify.

29. We may also point out that it can be contended that as the language now stands, all the schemes settled or modified or deemed to have been settled or modified under the provisions of the Hindu Religious and Charitable Endowments Act, 1951 fall outside the scope of section 65 (4) (*a*), because that clause refers to " schemes deemed to have been settled or modified by the Court under clause (*a*) of sub-section (2) of section 118 " and consequently excludes schemes deemed to have been settled or modified by other authorities under section 118 (2) (*a*) and at the same time does not take in schemes deemed to have been settled or modified by a Court since section 118 (2) (*a*) does not cover such schemes.

30. We may also notice here that the above conclusion of ours on the power of the Commissioner under section 65 (4) (*a*) of the Act does not in any way cause any public inconvenience, because withreference to a scheme settled or modified by a Court, it is always open to the affected

1. (1956) 2 Q. B. 288.
2. (1860) 29 L. J. N. S. C. L. 65-66.

parties to approach the Court for any fresh modification of the scheme.

31. Therefore, looked at from any point of view, we are clearly of the opinion that the Commissioner had no jurisdiction to modify the scheme settled by the Subordinate Judge's Court, Erode, in O.A. No. 2 of 1966 on his file.

32. We have already pointed out that the trial Court itself came to the conclusion that the order of the Commissioner is vitiated in so far as the Commissioner has not given notice to any of the affected parties. We have already extracted the rules in this behalf providing for the issue of notice, and those rules, as we have indicated already, cover only cases where the Commissioner takes action *suo motu*. Even with regard to the requirements of the rules that are actually in existence it was admitted before the trial Court that no such notice, as contemplated therein was given. In paragraph 11 of its judgment, the trial Court has considered this question. Admittedly in O.A. No. 2 of 1964, namely, application for amendment of the scheme made before the Commissioner, the respondents were only the mutt, as represented by the managing trustee and the President of the Tamil Nadu Arya Vysia Sangham, Madras. There is absolutely nothing to show that the plaintiffs in the suit, who were admittedly the disciples of the mutt took any part in the proceedings. According to P.W. 1, he knew of the amendment only at the time of election and there was no general body meeting before the application was filed before the Commissioner for amendment and therefore the consent of the general body was not taken. Equally no opportunity or notice was given to all the disciples of the mutt, either before the filing of the suit or before the filing of the application or after the filing of the application. The evidence let in on behalf of the plaintiffs as to the absence of any notice to any of the disciples was not countered by any evidence to the contrary or in the cross-examination. As a matter of fact, the Commissioner himself was not able to produce any materials before the Court to show that he gave notice at least before taking action on the application, as contemplated by Rule 5, which we have extracted already. Consequently, the conclusion of the trial Court that the order of the Commissioner is vitiated for failure to issue notice to the persons affected is unassailable.

33. Since, we are holding that the commissioner had no jurisdiction to modify the scheme as prayed for by the appellants herein, we are not expressing any opinion on the merits of the actual order of modification passed by the Commissioner.

34. Under these circumstances, there are no merits in the appeals and they are dismissed. There will be no order as to costs.

S.J. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami C.J.* and *A. Varadarajan, J.*

Mrs. Sampoorani Ammal .. *Appellant* *

v.

The Joint Chief Controller of Imports and Exports, Madras and another .. *Respondents.*

Imports (Control) Order, (1955), clauses 8, 6—Issue of licence for import by the Ministry of Foreign Trade and Supply—Licence issued to firm—Import of Art silk fabrics—Action for not utilising the imported goods in terms of conditions of import—Action against firm—Order against firm made applicable to partners of the firm—Validity—Notice to partner necessary before taking action—Notice to firm not sufficient notice to partner.

Though in answer to a show-cause notice to a firm regarding action proposed to be taken under clause 8 of the Imports (Control) Order, one of the partners could act for it and reply to the notice, as the matter would be relating to the firm's business activity, yet, when debarment was proposed against one of the partners, the other partners have no right to represent such partner. That would be personal to the partner and not relat-

* W. A. No. 499 of 1969. 18th *October*, 1973.

ing to the firm's business. Representation would be allowed only when it related to the business of the firm and not to the individual partner. Before passing an order debarring a partner, the partner would be entitled to notice to show cause against the action proposed under it. A notice to the firm would not be sufficient notice to the partner in respect of the action to be taken personally against the partner. This was for the reason that the individual partners may have defences peculiar to her or him, namely, that she or he was a minor, or that she or he was innocent and never knew anything of the irregularity complained of, or that she or he was only a sleeping partner not knowing anything of what the other partners were doing. Thus, there might be grounds which might be convincing for not imposing the punishment against the individual partner. [*Para.* 3.]

Appeal under clause 15 of the Letters Patent against the order or the Honourable Mr. Justice Ismail, dated 19th September, 1969 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2779 of 1969 presented under Article 226 of the Constitution of India to issue a writ of *certiorari,* calling for the records relating to the order, dated 18th August, 1969 passed by the first respondent therein in Reference No. JC/IB/41/66/1109 and to quash the same.

K. Srinivasan and *S. V. Subramanian,* for Appellant.

The Standing Counsel for Central Government, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, C.J.—One Rathinam Traders was granted a licence by the Ministry of Foreign Trade and Supply through the Joint Chief Controller of Imports and Exports for import of art silk yarn. The licence was subject to the condition that the goods imported should either be utilised by the importer or sold to other manufacturers of products covered by the Exports Promotion Scheme for Art Silk Fabrics who directly export their products or who sell a part of their products for export. A show cause notice, dated 20th May, 1969 under clause 10 of the Imports (Control) Order, 1955, as amended, for taking action under Clause 8 of the Order, was issued to the firm, stating that there was reason to believe that the goods imported against the licence had not been properly utilised or diposed of by them in terms of the conditions imposed on and applicable to the licencee. The firm furnished a reply through one of the partners. The firm had two partners one of them being the appellant, and two other persons, minors, admitted to the benefits of the partnership. After carefully considering the whole matter and the reply, the Deputy Chief Controller of Imports and Exports, acting for the Joint Chief Controller of Imports and Exports made the order, dated 18th August, 1969, by which he debarred the firm under clause 8 (*f*) and (*g*) of the Imports (Control) Order from receiving import licences, customs clearance permits and allotments of imported goods through STC/MMTC or any similar agencies for licensing periods, *viz.* April-March, 1968 and April-March, 1969. The order wound up by stating :

> " This decision shall also apply to the branches and partners of the firm as mentioned below."

2. One of the partners mentioned is the appellant. The propriety of the extension of the debarment to the appellant without any notice to her under the law was questioned but unsuccessfully before Ismail, J.

3. Taking the frame of clause 8 and also reading it along with clause 6, we think that though in answer to a notice to the firm for action to be taken under clause 8 one of the partners can act for it and reply to the show cause notice, as the matter would be relating to the firm's business activity, when debarment was proposed against one of the partners, we do not think that the other partners had a right to represent the partner against whom debarment was proposed. That would be a personal thing to the partner and not relating to the firm's business. Representation would be allowed only when it related to the business of the firm and not to the individual partner. We are of the view, therefore, that before passing the impugned order debarring the appellant, she would be entitled to

notice to show cause against the action proposed under it. A notice to the firm will not be sufficient notice to the partner in respect of the action to be taken personally against the appellant. This is so not only for the reason we mentioned, namely, that the proposal of debarment against the individual partner does not relate to the business of the firm, but also because the individual partners may have defences peculiar to her or him, namely, that she or he is a minor, or that she or he was innocent and never knew anything of the irreguarity complained of, or that she or he was only a sleeping partner not knowing anything of what the other partner was doing. Thus, there may be grounds which may be convincing for not imposing the punishment of debarment against the individual partner.

4. On that view, the appeal is allowe the effect of which is that the extension of the debarment to the appellant is quashed. No costs.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam* and *S. Maharajan, JJ.*

The State Electricity Board, Tamil Nadu, Madras .. *Appellant* *

v.

The Sree Meenakshi Mills Limited, Madurai and another .. *Respondents.*

Arbitration Act (X of 1940), section 16 (1) (c)—G.O.M. granting exemption to new industrial units—Mill establishing a branch—Branch whether a new industrial unit—Scope of arbitration.

In a dispute referred to an Arbitrator, he had to consider whether the branch of a Mill established at a particular place was a "new industrial unit" within the meaning of the G.O.Ms. 3059 P.W.D. dated 9th July, 1956. The Arbitrator made an award that the branch was not a "new industrial unit". On the question whether the branch was a "new industrial unit".

Held: The Arbitrator had nowhere considered the question whether the expression "new industrial unit" was intended to embrace only new industrial concerns or also new industrial units established by pre-existing concerns. The Arbitrator had not interpreted the G.O.'s having in mind the relevant considerations which ought to govern their interpretation. The proper course would be to remit the award under section 16 (1) (c) of the Arbitration Act for fresh consideration after taking into account the relevant factors pointed out by the Court. [*Para.* 5.]

Cases referred to :

Bungo Steel Furniture v. *Union of India*, (1967) 1 S.C.R. 633 : (1967) 2 S.C.J. 647 : A.I.R. 1967 S.C. 378 ; *Thawardas Perumal* v. *Union of India*, (1955) 2 M.L.J. (S.C.) 23 : (1955) 2 S.C.R. 48 : 1955 S.C.J. 445 : A.I.R. 1955 S.C. 468.

Appeal against the order of the Court of the First Additional Subordinate Judge of Madurai, dated 7th April, 1973 and made in I.A. No. 131 of 1970 in O.S. No. 4 of 1964.

P. Venkatachalapathy and *G. Veeramani*, for Appellant.

M. R. Narayanaswami, the and Additional Government Pleader for Respondents.

The Judgment of the Court was delivered by

Maharajan, J.—This appeal is preferred against the order of the learned First Additional Subordinate Judge, Madurai, setting aside the award of the Arbitrator dated 20th January, 1970. The award itself was made under the following circumstances: Sree Meenakshi Mills Limited, Madurai, instituted a suit in O.S. No. 4 of 1964 on the file of the Sub-Court, Madurai, for referring a dispute between the Sree Meenakshi Mills Limited and the State Electricity Board, Madras to an arbitrator for decision. The Electricity Board opposed the reference. But the Subordinate Judge directed the reference to be made to the Arbitrator for decision on two questions :—

(1) Whether the plaintiff's mill at Paravai is a new industrial unit within the meaning of the G.O. Ms. No. 3059 P.W.D., dated

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* A. A. O. No. 518 of 1973

21st March, 1974.

9th July, 1956 and marked as Exhibit B-22 in the case? and

(2) Whether the plaintiff is entitled to the exemption from levy of additional surcharge of 30 per cent. under the G.O. referred to above ?

The Electricity Board took the matter on appeal to this Court, but this Court confirmed the judgment of the learned Subordinate Judge and directed the Arbitrator to decide the question of limitation raised by the defence in addition to the two questions framed by the Sub-Judge, Mr. H. Devadoss, a Retired District Judge was appointed as the Arbitrator and he made an award holding that the claim was not barred by limitation, and that the plaintiff Mill at Paravai, not being a "new industrial unit" within the meaning of the above-mentioned G.O. was not entitled to exemption from levy of surcharge of 30 per cent under the G.O. Thereupon Sree Meenakshi Mills Limited filed an objection under sections 30 to 33 of the Arbitration Act praying that the award be set aside on the ground that it was vitiated (1) by an error apparent on the face of the record and (2) by legal misconduct on the part of the Arbitrator in so far as he relied upon the subsequent communications of the Government elucidating the G.O. The learned Subordinate Judge set aside the award in toto on the ground that the award was vitiated by an error apparent on the face of the record amounting to legal misconduct under section 30 of the Arbitration Act. It is against this order that the Electricity Board has preferred this appeal.

2. The question that fell for consideration by the Arbitrator turned upon the interpretation of G.O. Ms. No. 3069 P.W.D., dated 9th July, 1956, whereby the Governor of Madras in exercise of the powers conferred by section 3 of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949 (Madras Act XXIX of 1949) as re-enacted by Madras Act VI of 1956, made an amendment to the Madras Electricity Supply (Government and Licensees Areas) Surcharge Order, 1954. According to this amendment, the surcharge, referred to in clause 3 of the Surcharge Order, shall be levied on the overall charges referred to in clause (4) at the following rates :—

	Per cent.
I. Consumers served by the Madras Electricity Department direct (other than distributing licensees receiving bulk supply from the Department).	..
A. Consumers in Pykara, Mettur and Papanasam Systems :—	
(*a*) Railways	20
(*b*) High Tension Consumers:	
(i) New Industrial Units which have been in production for less than three years.	30
(ii) Others	50
(*c*) Low Tension consumers.	20
B. Consumers in Madras Electricity System	20
II. Distributing Licensees receiving bulk supply from the department	40
III. Consumers in areas fed with bulk supply of power purchased from Mysore and Travancore-Cochin	10
(*a*) Railway	10
(*b*) High Tension Consumers	
(i) New Industrial Units which have been in production for less than three years.	10
(ii) Others.	20
(*c*) Low Tension consumers.	10
IV. Consumers in areas of distributing licensees receiving bulk supply from the department.	

3. Provided that the State Government may from time to time order revision of the rates fixed in this clause.

4. The question is whether the Spinning Mill established at Paravai by the Sree Meenakshi Mills Limited in 1956 would be a new industrial unit within the meaning of the amended clause 6 of the rules. Two opposing constructions have been

put before us upon this expression. The one is that inasmuch as the intention of the Government was to encourage production, the expression "New Industrial Unit" must be construed to embrace any new unit established even by a pre-existing venture or concern. The other construction is that as the intention of the Government was only to encourage nascent industries, the expression "New Industrial Unit" would cover only new industrial concerns and not new industrial units established by old concerns. In the view that we take of this matter, it is unnecessary to consider which of these two interpretations is correct.

5. The learned Arbitrator has by writing a long order rendered it vulnerable to attack on the ground it is contrary to law. If after referring to the terms of reference he had, without any discussion, merely answered the same against Sree Meenakshi Mills, there could have been no scope for criticism against his award. But the learned Arbitrator chose to refer elaborately to the evidence and to express the process of ratiocination by which he arrived at a conclusion against Sree Meenakshi Mills. As has been held by the Supreme Court in *Bungo Steel Furniture* v. *Union of India*[1] :

> "It is now a well-settled principle that if an arbitrator, in deciding a dispute before him, does not record his reasons and does not indicate the principles of law on which he has proceeded, the award is not on that account vitiated. It is only when the arbitrator proceeds to give his reasons or to lay down principles on which he has arrived at his decisions that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error in law is apparent on the face of the award itself."

In *Thawardas Pherumal* v. *Union of India*[2], the Supreme Court, while setting aside the award of the arbitrator on the ground that his construction of the terms of a contract was faulty, observed as follows :

> "The question now arises whether his decision on this point is final despite its being wrong in law. In India this question is governed by section 16 (1) (*c*) of the Arbitration Act of 1940 which empowers a Court to remit an award for reconsideration
>
> 'where an objection to the legality of the award is apparent upon the face of it'. This covers cases in which an error of law appears on the face of the award. But in determining what such an error is, a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law is incidentally material (however necessary) in order to decide the question actually referred. If a question of law, is specifically be referred and it is evident that the parties desire to have a decision from the arbitrator about that rather (than) one from the Courts then the Courts will not interfere, though even there, there is authority for the view that the Courts will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision-that is to say, if he has decided on in, admissible evidence or on principles of construction that the law does not countenance or something of that nature."

It is therefore clear that if a mixed question of law and fact has been referred to the Arbitrator, as has been done in this case, it is open to the Court to interfere with the award of the Arbitrator if it is apparent on the face of the award that the Arbitrator had decided the questions referred to him upon principles of construction which the law does not countenance. In this case the learned Arbitrator has devoted the major part of his order to make out that the Spinning Mill at Paravai is only a branch of Sree Meenakshi Mills Limited at Madurai. After coming to the conclusion that it is only a branch, he jumps to the further conclusion that it cannot be regarded as a new industrial unit within the meaning of the G.O. The Arbitrator has nowhere considered the question whether the expression "New Industrial Unit" was intended to embrace only new industrial concerns or also new industrial units established by pre-existing concerns. Nor did he consider

1. (1967) 1 S.C.R. 633: (1967) 2 S.C.J. 647: A.I.R. 1967 S.C. 378.
2. (1955) 2 S.C.R. 48: 1955 S.C.J. 445: (1955) 2 M.L.J. (S.C.) 23: A.I.R. 1955 S.C. 468.

what was the intention of the Government in conferring a concession upon new industrial units. Was it because the Government wished to encourage production or because it wished to put nascent industries on their feet ? By examining the object and purpose of the amendment, he could have come to the conclusion as to the proper meaning of the expression "New Industrial Unit". As the matter is one of interpretation of the words used by the rule-making authority, it is clearly a question of law. After perusing the order of the Arbitrator, we are convinced that he has not interpreted the G.O.'s having in mind the relevant considerations which ought to govern the interpretation thereof. We therefore think it right under section 16 (1) (*c*) of the Arbitration Act that we should remit the award of the Arbitrator for fresh consideration after taking into account the relevant factors pointed out by us. We may also say that we are not confirming the finding of the Sub-Court that the Arbitrator has in any manner legally misconducted himself. We do not think that the subsequent communications from the Government have in any manner influenced him in coming to the conclusion that he did. We therefore think that the award cannot be set aside under section 30 of the Arbitration Act on the ground of legal misconduct. We understand that the Arbitrator is since dead. The First Additional Subordinate Judge, Madurai, will, therefore, appoint a fresh Arbitrator and remit the award to him for the purpose indicated in this order. In the circumstances of the case, we pass no order as to costs.

S.J. *Award remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Natarajan, J.*

Associated Traders and Engineers (Private) Limited .. *Petitioner**

v.

M/s. V. C. S. Industries (Private) Limited, Coimbatore-11 and another .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 21—*Suit for value of goods—Carrier's liability—Objection to jurisdiction—Judgment delivered on merits—Revision—Whether Appellate Court can interfere.*

Where, in an action, judgment had been rendered on merits, the judgment ought not to be interfered with by an appellate Court merely on account of an objection taken by one of the parties regarding the territorial jurisdiction of the trial Court, unless the aggrieved party was able to establish that there had been a failure of justice in any manner by the trial Court having proceeded with the trial and rendering a judgment in the case on merits. [*Para.* 4.]

Cases referred to :—

Hakam Singh v. *Gammon (India) Limited*, (1971) S.C.D. 183 : (1971) 2 S.C.J. 576 : A.I.R. 1971 S.C. 740 ; *Kiran Singh* v. *Chaman Paswan*, 1954 S.C.J. 514 : 1955 S.C.R. 117: (1954) 2 M.L.J. 60: A.I.R. 1954 S.C. 340.

Petitions under section 25 of Act I of 1887 praying the High Court to revise the order of the Court of the Third Additional Subordinate Judge, Coimbatore, dated 22nd April, 1972 and made in S.C.S. Nos. 18 and 19 of 1971 respectively.

Row and Reddy, K. Venkataraman and *S. D. Ramalingam*, for Petitioner.

N. Varadarajan, for Respondent.

The Court delivered the following

JUDGMENT.—Associated Traders and Engineers (Private) Limited, the petitioner in both these petitions, are carrying on business as carrier and transport operator.

* C.R.P. Nos. 1789 and 1790 of 1972.
9th January, 1974.

In respect of certain goods entrusted to the petitioner by the respondents in the two petitions for transport, the goods did not reach the destination and were lost *en route*. The respondents, therefore, filed actions against the petitioner and claimed the value of the goods entrusted for transport. One of the defences raised by the petitioner before the lower Court was that as per the terms of the contract entered into between the parties all claims against the petitioner should be sued for only in the Courts in Delhi city and that the said condition had also been incorporated as Clause 17 in the G. R. The learned Subordinate Judge did not accept this contention on the ground that no part of the cause of action had arisen within the jurisdiction of the Delhi Court. After proceeding to consider the claims on merits, the learned Subordinate Judge decreed the amounts claimed by the plaintiff in each of the two actions.

2. It is to contend that the action of the learned Subordinate Judge in refusing to uphold the objection raised by the petitioner that no other Court, except the Court in Delhi city, had jurisdiction to entertain the actions, is wrong and unsustainable, the petitioner has preferred these revision petitions.

3. The learned Counsel for the petitioner contends that even though no part of the cause of action arose within the limits of the Courts in Delhi city, the registered office of the petitioner is situated in Delhi and as such the learned Subordinate Judge was not justified in brushing aside the objection raised by the petitioner on the question of jurisdiction solely on the ground that no part of the cause of action had arisen within the limits of the Courts situate in Delhi city. In order to contend that the word "Corporation" occurring in *Explanation* II to section 20 of the Code of Civil Procedure would include within its ambit companies registered under the Indian Companies Act also, the learned Counsel for the petitioner relies on a decision of the Supreme Court in *Hakam Singh* v. *Gammon (India) Limited*[1]. No doubt, the contention of the learned Counsel in this behalf is well-founded. The learned Subordinate Judge has clearly failed to see that even if no part of the cause of action arose within the limits of the Courts situate in Delhi city, nevertheless, those Courts would certainly have jurisdiction to entertain the actions of the plaintiffs, inasmuch as the registered office of the petitioner-company is situated in the City of Delhi.

1. (1971) S.C.D. 183 : (1971) 2 S.C.J. 576 : A.I.R. 1971 S.C. 740.

4. Notwithstanding my upholding the grievance of the revision-petitioner in this behalf, no relief can be given in these revision petitions on account of the fact that both the suits have been tried fully and judgments have been rendered on merits against the revision petitioner. In cases of this kind, it is well known that where, in an action, judgment has been rendered on merits, the judgment ought not to be interfered with by an appellate Court merely on account of an objection taken by one of the parties regarding the territorial jurisdiction of the trial Court, unless the aggrieved party is able to establish that there has been a failure of justice in any manner by the trial Court having proceeded with the trial and rendering a judgment in the case on merits. In *Kiran Singh* v. *Chaman Paswan*[1] the Supreme Court has laid down as follows :

> "Section 11 (Suits Valuation Act) enacts that notwithstanding anything in section 578 of the Code of Civil Procedure an objection that a Court which had no jurisdiction over a suit or appeal had exercised it by reason of over-valuation or under-valuation, should not be entertained by an appellate Court, except as provided in the section .... The drafting of the section has come in and deservedly— for considerable criticism ; but amidst much that is obscure and confused, there is one principle which stands out clear and conspicuous. It is that a decree passed by a Court, which would have had no jurisdiction to hear a suit or appeal but for over-valuation or under-valuation, is not to be treated as, what it would be but for the section, null and void, and that any objection to jurisdiction based on over-valuation or

1. (1954) S.C.J. 514 : (1955) 1 S.C.R. 117 : (1954) 2 M.L.J. 60 : A.I.R. 1954 S.C. 340.

under-valuation, should be dealt with under that section and not otherwise.

....

With reference to objections relating to territorial jurisdiction, section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional Court, unless there was a consequent failure of justice. It is the same principle that has been adopted in section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying sections 21 and 99, Civil Procedure Code, and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits."

5. Admittedly, the Court which rendered the judgments against the revision-petitioner did have jurisdiction to entertain the actions. But for the stipulation in the contract between the parties, the revision petitioner can have nothing to say about the jurisdiction of the Court to entertain the suits. Such a Court having entertained the actions and rendered judgment on merits, the appellate or revisional Court will not set at naught the judgments rendered by that Court, unless the aggrieved party shows that there has been failure of justice in any manner. Admittedly, the revision petitioner is not able to show in what manner there has been any failure of justice by the learned Subordinate Judge of Coimbatore entertaining the suits and disposing them of on merits. Consequently, both the revision petitions fail and they are dismissed. No costs.

S.J. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—*P. S. Kailasam and S. Maharajan, JJ.*

Nallammal .. *Appellant**

v.

Sivani Ammal *alias* **Chinnammal and another** .. *Respondens.*

Transfer of Property Act (IV of 1882), section 92—Suit for redemption—Effect of Amending Act of 1929—Suit by non-redeeming co-mortgagor within 60 years—Within time.

Whatever the rights of the redeeming co-mortgagor and the non-redeeming co-mortgagor might have been before the amendment of the Transfer of Property Act (II of 1929) came into force, under section 92, the co-mortgagor along with the other persons referred to in section 91 shall, on redeeming the property subject to the mortgage, have so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. This right of the co-mortgagor redeeming properties subject to the mortgage is available whenever there is a redemption by the co-mortgagor after the amendment came into force. There are no qualifying words in the section to construe that this benefit is available only to mortgages that were created after the amendment came into force. [*Para.* 6.]

In the instant case, it was found that the non-redeeming co-mortgagor's suit within 60 years from the date of the original mortgage was in time and his suit for redemption could not be resisted. [*Para.* 6.]

Cases referred to :—

Rukmani Ammal v. *Venkatarama Iyer*, (1964) 2 M.L.J. 1 : I.L.R. (1964) 1 Mad. 530 : 77 L.W. 41 : A.I.R. 1964 Mad. 281 ; *Champaka* v. *Sivathanu Pillai*, (1964) 1 M.L.J. 161 : 77 L.W. 151 : I.L.R. (1963) Mad. 1110 : A.I.R. 1964 Mad. 269.

* L.P.A. No. 15 of 1969. 30th *January*, 1974.

Appeal under clause 15 of the Letters Patent against the decree of the Honourable Mr. Justice Natesan, dated 13th September, 1968 and passed in S.A. No. 161 of 1966 preferred to the High Court against the decree of the Court of the Second Additional Subordinate Judge of Madurai, dated 3rd October, 1974 and passed in A.S. No. 87 of 1964 (O.S. No. 217 of 1962 D.M.C. (Additional), Madurai Taluk.

K. Sarvabhauman and *T. R. Mani*, for Appellant.

P. Ramaswami Ayyangar and *R. Krishnamachari*, for Respondents.

The Judgment of the Court was delivered by

Kailasam, J.—This appeal is preferred by the plaintiff in the suit against the judgment of Natesan, J. The suit was filed for redemption and partition of 1/3rd share of 'B' schedule property of an extent of 1 acre and 98 cents of nanja. The short facts are : The property belonged to one Karutha Pichan Ambalam. He had three sons, Periakaruppa, Chockanand and Velu, and two daughters, Peria Karuppayee and Nallammal. Nallammal is the plaintiff. On 22nd October, 1918, under Exhibit B-2, Karutha Pichan Ambalam othied the suit property in favour of one Amir Mia Sahib for Rs. 1,000. Subsequently, Chockanandi, who was entitled to 1/3rd of the suit item, sold his 1/3rd share to Peria Karuppayee, his sister for Rs. 1,000 under Exhibit A-1 on 18th March, 1936. Subsequently, by Exhibit B-10, dated 26th August, 1942, Velu, another son of Karutha Pichan Ambalam, sold his 1/3rd share to his brother Chockanandi for Rs. 400. Under Exhibit B-4, dated 26th August, 1942, Periakaruppa, who was entitled to 1/3rd share, and Chockanandi, who was entitled to another 1/3rd share by virtue of his purchase under Exhibit B-10, created a second mortgage of the entire extent of the property to the heir and son of the othidar Amir Mia Sahib for Rs. 260. They again created another othi under Exhibit B-1, dated 5th July, 1943, in favour of one Subbiah Pillai for Rs. 2,000 and directed him to discharge the original othi Exhibit B-2 and the subsequent melothi Exhibit B-4, dated 26th August, 1942. Subbiah Pillai discharged the two othies Exhibits B-2 and B-4 and obtained the endorsements Exhibit B-3 and Exhibit B-5 on 6th July, 1943. On 20th August, 1947, under Exhibit B-6 Velu and Alagupillai Ammal, wife of Chockanandi, sold to Subbiah Pillai the property for Rs. 3,000. Subsequently, under Exhibit B-8, dated 22nd April, 1962, Subbiah Pillai sold the property to the first defendant and his wife, the second defendant, of an extent of 1 acre and 48 cents for Rs. 3,400. On the same date, under Exhibit B-9, Subbiah Pillai and others sold to the third defendant the remaining 50 cents for Rs. 1,150. The present suit for redemption of 1/3rd share of B schedule property was filed by the plaintiff on 22nd August, 1962.

2. The plaintiff claimed 1/3rd right of Karutha Pichan Ambalam, as Peria Karuppayee, purchased 1/3rd share of Chockanandi under Exhibit A-1 out of the income from her husband's estate and as she is the co-widow of Peria Karuppayee. The only question, therefore, is whether the plaintiff is entitled to redeem and claim partition of 1/3rd share of the B schedule property. That she is entitled to 1/3rd share of the mortgagor's right is also not disputed. But the point that is taken is that the plaintiff lost her right due to adverse possession, as two of the mortgagors Periakaruppa and Chocknandi created a second mortgage under Exhibit B-4 on 26th August, 1942 and a third mortgage under Exhibit B-1, dated 5th July, 1943, and ultimately sold the property under Exhibit B-6 on 20th August, 1947. It was urged that as the two mortgagors purported to deal with the entire property, they should be deemed to have been in adverse possession of the right of equity which belonged to the plaintiff and in any event when the property was sold by the two mortgagors to the exclusion of the plaintiff it was submitted that the right, if any, of the co-mortgagor-plaintiff would last only for 12 years from that date, and as the plaintiff's suit is beyond 12 years from that date, her remedy was barred by time.

3. The trial Court held that the mortgagor had a right to redeem his share of the property within 60 years from the date of the original mortgage, under Exhibit B-2,

dated 22nd October, 1918, and that as the suit was filed in 1962, it was within time. The appellate Court also confirmed the view of the trial Court. In the second appeal, Natesan, J., also took the view that the mortgagor is entitled to redeem the mortgage within a period of 60 years from the date of the original mortgage. But because of an observation of a Full Bench of this Court in *Rukmani Ammal* v. *Venkatarama Iyer*[1], he found himself constrained to hold that the plaintiff is not entitled to redeem the mortgage.

4. The two Full Bench judgments that are referred to and elaborately dealt with by the learned Judge are *Champaka* v. *Sivathanu Pillai*[2] and *Rukmani Ammal* v. *Venkatarama Iyer*[1]. The Full Bench in *Champaka* v. *Sivathanu Pillai*[2]; held that a redeeming co-mortgagor has two distinct rights in respect of moneys paid by him in excess of his share for discharging a common mortgage: (*i*) a right to step into the shoes of the mortgagee satisfied by him; and (*ii*) a right to recover contribution. Dealing with the right of the non-redeeming co-mortgagor, the Full Bench held at page 166:

> "Correlative to the two rights possessed by the redeeming co-mortgagor, there will naturally be a right in the non-redeeming co-mortgagor to redeem his property on payment of his share of the liability either: (*i*) within the period allowed for redemption of the original mortgage rights to which the redeeming co-mortgagor has been subrogated; or (*ii*) within twelve years of the date of payment of the mortgage debt by the redeeming co-mortgagee."

At page 168, the Full Bench has stated the position as follows:—

> "From the foregoing it will be plain that there will be two periods within which a non-redeeming mortgagor can obtain his property from his co-mortgagor who had redeemed; the first is based on the rule of subrogation and the second is the correlative obligation in the redeeming co-mortgagor to give up the property belonging to his co-mortgagor on being paid the money due by him. In the former case where the mortgage is possessory, the period of limitation will be governed by Article 148 (Article 136 of Travancore Limitation Regulations) and the starting point for limitation will be the same as for the original mortgage redeemed. In the latter case, the non-redeeming co-mortgagor will have a period of twelve years from the date of redemption of the original mortgage by the other co-mortgagor. It will be open to the non-redeeming co-mortgagor to take advantage of anyone of these periods, whichever is to his advantage."

The Full Bench decision is clear authority for the proposition that the non-redeeming mortgagor would have 60 years from the date of the original mortgage or 12 years from the date when the redeeming mortgagor redeemed the mortgage, the mortgagor being at liberty to avail either of the periods which is advantageous to him. Applying this rule, there could be no difficulty in holding that the plaintiff in the present case is entitled to redeem, as the suit for redemption is within 60 years from the date of the original mortgage.

5. The point that was taken before Natesan, J., and also before us was that the observation of the Full Bench is not applicable to a case where the mortgage was created before the amendment Act II of 1929 came into force. In support of this contention, a passage in the Full Bench decision in *Rukmani Ammal* v. *Venkatarama Iyer*[1] was relied on. The Full Bench was considering a case where a mortgage deed was dated 10th April, 1881. In 1922 one of the mortgagors purported to sell the entire interest of the mortgagors to the father of the respondent, who filed the suit for redemption. The suit was decreed and possession was taken on 15th June, 1927 and 16th June, 1927. The co-mortgagor filed the action, which was the subject-matter of the decision of the Full Bench, for redemption on 20th July,

1. (1964) 2 M.L.J. 1 : I.L.R. (1964) 1 Mad. 530 : 77 L.W. 41 : A.I.R. 1964 Mad. 281.

2. (1964) 1 M.L.J. 161 : 77 L.W. 151 : I.L.R. (1963) Mad. 1110 : A.I.R. 1964 Mad. 269.

1. (1964) 2 M.L.J. 1 : I.L.R. (1964) 1 Mad. 30 : 77 L.W. 41 : A.I.R. 1964 Mad. 281.

1956. The Full Bench observed that the period of limitation applicable for redemption by the non-redeeming co-mortgagor of his share of the property will be the same as that for redemption of the original mortgage as prescribed under Article 148 of the Limitation Act, that is, 60 years from the date of the original mortgage. Before the Full Bench, it was pleaded that as the suit by the father of the respondent for redemption was decreed on 15th June, 1927 that is two years before the amendment of sections 92 and 95 of the Transfer of Property Act, came into force, the non-redeeming mortgagor was not entitled to the benefits of the amendment. The Full Bench negatived the contention and held that the non-redeeming mortgagor is entitled to redeem within a period of 60 years from the date of the original mortgage. Regarding the plea that the redeeming co-mortgagor was in adverse possession, the Full Bench held that though the redeeming co-mortgagor might have been asserting full title to the property in himself, his possession being referable to a lawful title under which he could hold the entire property, no question of unlawful or adverse possession postulating a trespass can at all arise. Thus, the contention that the redeeming co-mortgagor was in adverse possession was also negatived.

6. The sentence which gave rise to the difficulty, which Natesan, J., found insurmountable, runs as follows :—

> "It is now well settled that where a co-mortgagor redeems a mortgage created after Act II of 1929 which secured not only his property but that of his co-mortgagor, the latter will be entitled to redeem his share of the mortgage property from the redeeming co-mortgagor by payment of his share of the original liability, expenses of redemption, etc."

The words "where a co-mortgagor redeems a mortgage *created after Act II of 1929*" were understood as laying down that the right of the co-mortgagor to redeem his share of the property is confined only to mortgages that were created after Act II of 1929. In our view, in the context what the Full Bench meant was that the right of the non-redeeming co-mortgagor will be available to cases where the redeeming co-mortgagor redeemed the mortgage after Act II of 1929 came into force. The amended sections 92 and 95 make the position very clear. Whatever the rights of the redeeming co-mortgagor and the non-redeeming co-mortgagor might have been before the amendment came into force, under section 92 of the Transfer of Property Act, the co-mortgagor along with the other persons referred to in section 91 shall, on redeeming the property subject to the mortgage, have so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. This right of the co-mortgagor redeeming properties subject to the mortgage is available whenever there is a redemption by the co-mortgagor after the amendment came into force. There are no qualifying words in the section to construe that this benefit is available only to mortgages that were created after the amendment came into force. Section 95 of the Transfer of Property Act also provides that where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property. This right is also available to one of the mortgagors to redeem the mortgaged property after the amendment came into force. We find, therefore, no difficulty in understanding the observation of the Full Bench as referring only to cases where the redeeming co-mortgagor redeems the mortgage after Act II of 1929 came into force. We feel that Natesan, J., was in error in giving a literal construction to the words in the decision of the Full Bench, giving them a meaning which they would never have intended. We find that the non-redeeming co-mortgagor's suit within 60 years from the date of the original mortgage is in time and his suit for redemption cannot be resisted. The contention that the redeeming co-mortgagor is in adverse possession cannot also be accepted because that position has been clearly laid down by both the decisions of the Full Bench referred to above. In the result, we allow the appeal with costs

throughout. The decree of the trial Court will be restored.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

Madras Motor and General Insurance Company Limited, through its Head Office at Madras .. *Appellant**

v.

Madathi Ammal and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), sections 10, 96 (2) (b) (ii)—Motor accident—Driver's licence not renewed within thirty days of expiry—Insurance Company claiming exemption under section 96 (2) (b) (ii)—No express clause in the policy—Insurance company not entitled to exemption under section 96 (2) (b) (ii).

Section 96 of the Motor Vehicles Act gives an option to an Insurance Company to incorporate in the policy any of the conditions mentioned in section 96 (2) (*b*) (ii). The Insurance Company may, therefore, incorporate in the policy "a condition excluding driving by a named person or persons or by any person who is not duly licensed or by any person who has been disqualified for holding or obtaining a driving license or to exclude driving by all these three classes of persons." It is open to the company to refuse to cover a risk brought about by a person who, at the time of the accident, had held a license but had no effective license covering the period of the accident. Inasmuch as the Insurance Company had, in the instant case, exercised its option and thought it right to cover an accident caused by a person who had held a license prior to the date of the accident (that is, a license that had expired prior to the date of the accident but had not chosen to renew it during the period allowed by law, the company cannot be exonerated of liability in respect of the accident. [*Para.* 4.]

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* A.A.O. No. 220 of 1972. *1st March,* 1974.

Case referred to :

Motor Owner's Insurance Company v. *Daniel*, 84 L.W. 518: (1971) 2 M.L.J. 377 : A.I.R. 1972 Mad. 15.

Appeal against the order of the Motor Accidents Claims Tribunal, Tirunelveli, dated 22nd March, 1972 and made in C.P. No. 71 of 1969.

A. Devanathan, for Appellant.

V. Ratnam, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the Insurance Company against the order of the Motor Accidents Claims Tribunal, Tirunelveli, awarding a compensation of Rs. 5,000 under section 110-A (1) of the Motor Vehicles Act to one Madathi Ammal for the death of her husband, Paramasiva Konar in a traffic accident. The accident itself took place at 4-30 A.M. on 8th January, 1969. While the deceased was driving his single bullock cart in an easterly direction along the Tirunelveli-Tiruchendur Main Road, west of Vittilapuram Vilakku, lorry MDT 7441 belonging to Badrakali Ammal (the first respondent in the Court below) and insured with the appellant and driven by one Ramachandran dashed against the bullock cart, with the result the deceased was thrown off the cart and killed on the spot.

2. After the accident, the driver himself laid Exhibit A-3, the first information report, in which he stated that while driving, he had a nap for a second, with the result his lorry dashed against the bullock cart, and the driver of the cart and the bullock died on the spot. On foot of this first information report, the driver was prosecuted under section 304-A and 279, Indian Penal Code before the Additional First Class Magistrate, Tirulnelveli, and convicted and sentenced to undergo rigorous imprisonment for nine months and three months respectively. In these circumstances, learned Counsel for the appellant is fair enough to concede that the plea of rashness and negligence on the part of the lorry driver has been established and he is not prepared to challenge the finding in this behalf.

3. The next question that arises for consideration is, what is the quantum of compensation payable to the widow of the deceased ? The evidence of P.W. 1, the widow is that her husband used to earn about Rs. 5 every day and that at the time of the accident he was aged 40. But for the accident, it is not unlikely that he would have lived for another 20 years. If he had been paying even Rs. 75 per mensem, to his dependant wife, he would have paid Rs. 900 per year to her for a period of 20 years. Even making allowance for the lump sum payment, I would have fixed the amount of compensation at a much higher figure than the amount of Rs. 5,000 fixed by the Tribunal. However, as the claimant has not preferred any appeal, I confirm the quantum fixed by the Tribunal.

4. The third and most important question raised by the Insurance Company may next be considered. Exhibit B-1 is the history sheet of Ramachandran, who drove the lorry and caused the accident. This history sheet has been maintained in the office of the Regional Transport Authority, Tirunelveli. It is found therefrom that the driving licence originally issued to Ramachandran expired on 27th November, 1968. Under section 10 of the Motor Vehicles Act,

> "A driving licence issued or renewed under this Act shall, subject to the provisions contained in this Act as to the cancellation of driving licences and the disqualification of holders of driving licences for holding or obtaining driving licences, be effective without renewal for a period of three years only, from the date of the issue of the driving licence, or, as the case may be, from the date with effect from which the driving licence is renewed under section 11, and the driving licence shall be deemed to continue to be effective for a period of thirty days after the date of its expiry."

By force of section 10, therefore, the licence of Ramachandran shall be deemed to continue to be effective for a period of thirty days from 27th November, 1968. In other words, it must be deemed to have been in force till 27th December, 1968. Actually, Ramachandran appears to have renewed his licence, not within the period of the grace allowed by section 10 of the Act, but with effect from 10th January, 1969. Under the proviso to sub-section (1) of section 11 of the Act:

> "Provided that in any case where the application for the renewal of a driving licence is made more than thirty days after the date of its expiry, the driving licence shall be renewed with effect from the date of its renewal."

It must, therefore, be taken that Ramachandran applied for renewal only on 10th January, 1969, and that is why it has been renewed for a period of three years from 10th January, 1969 to 9th January, 1972. It would, therefore, follow that on 8th January, 1969 the actual date of the accident, the driver had no effective or valid licence. Learned Counsel for the Insurance Company contends that under section 96 of the Motor Vehicles Act, the Insurance Company is not liable to cover the risk brought about by a driver, who on the date of the accident had no valid licence. Before considering the validity of this contention, I think it necessary to set out the relevant clauses of section 96 of the Act. That section provides that an insurer shall be entitled to defend the action on any of the following grounds, *viz.*

> "2 (*a*) .... or
>
> (*b*) that there has been breach of a specified condition of the policy, being one of the following conditions, namely :
>
> (i) a condition excluding the use of the vehicle
>
> (*a*) ....
>
> (*b*) ....
>
> (*c*) ....
>
> (*d*) ....
>
> (ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification ...."

While the above provision makes it clear that the right of the Insurance Company to defend is restricted to the various conditions set out in this sub-section, it is

also clear from the sub-section that none of these defences will be available to the Insurance Company unless it incorporates these conditions in the policy. The expression in clause (*b*) of section 96 (2) " that there has been breach of a specified condition of the policy, being one of the following conditions," reinforces this conclusion. It is contended on behalf of the Insurance Company that by virtue of the provisions of section 96, the Insurance Company is exonerated of the liability to cover an accident caused by a driver, who did not hold an effective licence on the date of the accident, though prior to the date of the accident he might have held a valid licence and on the date of the accident he was not disqualified for holding or obtaining a driving licence. I am unable to agree. All that the section does is to enumerate the conditions, which the Insurance Company is at liberty to incorporate in the policy. What the Act in effect tells the Insurance Company is "There are certain risks which, under the statute, you are bound to cover. There are certain other risks, which by negotiating with the owner of the vehicle you may choose to cover at your option, though under the statute you are not bound to cover the same". Section 96 enables the Insurance Company to defend an action against it on the ground that there has been a breach of a specified condition of the policy and enables the Company to incorporate in the policy any of the conditions mentioned in sub-clause (ii) of clause (*b*) of section 96 (2), which enables the Insurance Company to incorporate in the insurance policy " a condition excluding driving by a named person or persons or by any person who is not duly licensed or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification ". This clause, it may be noted, contains three sub-clauses which are disjunctive, *viz.*: (1) excluding driving by a named person or persons ; or (2) excluding driving by any person who is not duly licensed ; or (3) excluding driving by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification. The first clause permits an Insurance Company to rid itself of the liability by providing that if an accident occurs while a named person drives the vehicle, the company shall not be liable to indemnify the owner. The second clause enables the Insurance Company to disclaim liability in cases where at the time of the accident, the driver is a person who does not hold a licence duly granted to him. The third clause enables the Insurance Company to disclaim liability in cases where during the accident the vehicle was driven by a person who might not hold a valid licence at the time of the accident, but who had held a licence previously, but who had not been disqualified for holding or obtaining it. In other words, the three-sub-clauses in section 96 (2) (*b*) (ii) indicate the amplitude of exclusion. As the sub-clauses are disjunctive, an option is given to the Insurance Company to exclude driving either by a named person or by a person who is not duly licensed or by a person who has been disqualified for holding or obtaining a driving licence or to exclude driving by all these three clases of persons. In other words, it is open to the Insurance Company to refuse to cover a risk brought about by a person like driver Ramachandran, who at the time of the accident, had held a licence, but had no effective licence covering the period of the accident. But, unfortunately, the Insurance Company has in this case exercised its option even to include a person, who had held a licence prior to the date of the accident, (that is to say, a licence that had expired prior to the date of the accident) and yet was not disqualified for holding or obtaining such a licence at the time of the accident. Exhibit B-3 is the policy admittedly issued by the appellant to the owner of the lorry. The schedule to this policy delineates the area of liability of the Insurance Company. The limits of the liability are given in the schedule as Rs. 20,000 in respect of any one accident and Rs. 20,000 in respect of any one claim or series of claims arising out of one event. Then the schedule proceeds to define the limitations of the vehicle as to use. Then, in red ink, the following words occur :

" The policy does not cover :

1. Use for organised racing, pacemaking reliability trial or speed testing.

2. Use whilst drawing a trailer....

3. Use for the conveyance of passengers for hire or reward."

Then comes the clause relating to the driver. That clause says :

> "Driver : Any of the following :—
>
> (*a*) the Insured,
>
> (*b*) Any other person, provided, he is in the Insured's employ and is driving on his order or with his permission."

Then, there is the most important proviso, which is in print and which runs as follows :

> "Provided that the person driving holds a licence to drive the Motor Vehicle or *has held* and is not disqualified for holding or obtaining such a licence".

What is the proper construction to be placed on the words, "the person driving holds a licence to drive the Motor vehicle or has held and is not disqualified for holding or obtaining such a licence"? This clause clearly contemplates a person who, although he had obtained a licence which expired prior to the accident, did not hold a valid licence on the date of the accident, and yet was not disqualified for holding or obtaining such a licence. The Insurance Company with its great business, experience, must have thought it right to cover an accident caused by a person who had considerable driving experience, and yet due to inadvertance or absent mindedness, has not chosen to renew that licence during the period allowed by law and has been involved in an accident while he had not yet obtained a renewal of the licence. Evidently, the Insurance Company trusts the experienced drivers not to drive the vehicle rashly and negligently, this expectation resting upon their past performance rather than upon the technical, but unimportant question whether they have been careful and alert enough to renew the licence, within the period allowed by law. Mr. Devanathan, learned Counsel for the Insurance Company says that the proviso should be construed in such a way as to exclude the intention of the Insurance Company to include driving by a person who did not hold an effective licence at the time of the accident. I am entirely at a loss to accept such a construction. The Insurance Company has used the words deliberately to show that it has made a distinction between two categories of drivers, *viz.*: (1) drivers holding licence to drive the motor vehicle at the time of the accident; and (2) drivers, who have held a licence prior to the date of the accident, but not disqualified for holding it at the time of the accident, though they hold no valid licence at the time of the accident. I, therefore, refuse to accept the rather artificial construction which is sought to be put by learned Counsel upon the proviso contained in the Policy.

5. It is lastly contended that the construction contended for, would receive support from section 3 of the Motor Vehicles Act. I am unable to agree. Section 3 says :

> "No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to himself authorising him to drive the vehicle ;...."

The penalty for disobeying section 3 is that the driver would forfeit his licence or otherwise would be penalised. There is nothing in section 3 or any other section of the Act which would justify the contention that a driver violating section 3 or any other penal provision of the Act would by virtue of his violation relieve the Insurance Company of its liability to indemnify. Violation of the motor vehicles rules is a matter for which certain penalties are prescribed. Those penalties do not and cannot exonerate the Insurance Company of its liability because under an express contract, it has stipulated to cover a liability of this kind. In the result, I repel all the contentions raised by the Insurance Company and confirm the order of the Court below.

6. I may also refer to a decision of Raghavan, J., in *Motor Owner's Insurance Company* v. *Daniel*[1], upon which reliance is placed by learned Counsel. That was a case where the Insurance policy re-

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1. 84 L.W. 518 : (1971) 2 M.L.J. 377 : A.I.R. 1972 Mad. 11.

peated word for word the provisions of section 96 (2) (*b*) (ii) of the Act. As I have already held, section 96 (2) (*b*) (ii) of the Act gives an option to the Insurance Company to lay down any of the three conditions specified in sub-clause (ii). In that case, the Insurance contract had incorporated cumulatively, two out of the three conditions contemplated in sub-clause (ii), and, thereby excluded driving not only by a person who had held a licence, though he was not disqualified at the time of the accident, but also driving by a person, who was not at the time of the accident duly licensed. But, in this case, the Insurance Company without incorporating all the permissible conditions mentioned by the statute, has opted to exclude driving only by a person, who had, prior to the accident, held the licence and was not disqualified at the time of the accident from holding or obtaining such a licence. I do not, therefore, think that the decision of Raghavan, J., has any application to the facts of this case.

7. The result is, the appeal fails and will stand dismissed with costs.

8. I direct, under section 110-CC of the Motor Vehicles Act, that the claimant shall be entitled to simple interest at 6 per cent. upon the amount of Rs 5,000 from the date of the claim, 28th February, 1969 upto the date of payment. It appears that a sum of Rs. 2,000 has been already deposited by the Insurance Company into the Court in which case it will not carry interest from the date of deposit, though it will carry interest from the date of claim upto the date of deposit. Time for payment of the balance two months.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, C. J., and V. V. Raghavan, J.*

Sarayakaran *alias* **Muniyan** .. *Petitioner**

v.

Perumal .. *Respondent.*

Partition Act (IV of 1893), sections 3 (1), 2—Order under section 2 for sale of property—Application under section 3—Whether lies—Scope.

In order that an application under section 3 (1) of the Partition Act may be considered, the petitioner should apply to have the order for sale passed under section 2 set aside. It may be even visualised that a sale has taken place under section 2. Even in such a case, there is no bar to be inferred from the two sections, to an application being made under section 3 (1), but only it cannot be considered unless the order for sale made under section 2 is set aside. That is, the correct approach. A right to apply under section 3 (1) accrues the moment a request under section 2 has been made to the Court. [*Para.* 12.]

Cases referred to :—

Angamuthu Mudaliar v. *Ratna Mudaliar*, (1925) I.L.R. 48 Mad. 920 : 49 M.L.J. 411 : A.I.R. 1925 Mad 1234 ; *Nitish Chandra Ghosh* v. *Promode Kumar Ghosh*, A.I.R. 1953 Cal. 18; *Jayarama* v. *Annamalai*, I.L.R. (1966) 2 Mad. 530 ; *Dhanki Mahajan* v. *Rama Chandubha*, (1969) 1 S.C.J. 157 : (1968) 3 S.C.R. 759 : A.I.R. 1969 S.C. 69.

Petition under section 115, Civil Procedure Code, praying the High Court to revise the order of the Court of the Additional District Munsif, Tirupattur, dated 5th August, 1970 and made in I.A. No. 1199 of 1970 in O.S. No. 586 of 1964.

T. S. Subramaniam, for Petitioner.

The Judgment in the first instance was delivered by

Ganesan, J.—The first defendant has preferred this Civil Revision Petition on

*C.R.P. No. 966 of 1971. 12*th March*, 1973.

being aggrieved that the learned Additional District Munsif of Tirupattur had dismissed his application I. A. No. 1199 of 1970 in I.A. No. 1189 of 1967 in O.S. No. 586 of 1964 filed under section 3 of the Partition Act for fixing the value of 1/3rd share of the respondent plaintiff, Perumal in respect of item 3 of the suit properties and for sale of such share in his favour.

2. The respondent has filed I.A. No. 1622 of 1968 under section 2 of the Partition Act for sale of the property, and the application was allowed by the Court on 20th August, 1969, and sale papers had also been filed. The petitioner subsequently filed I. A. No. 1199, out of which the Civil Revision Petition arises, under section 3 of the Partition Act praying that the 1/3rd share of the respondent-plaintiff may be sold in his favour and that the value of the said share may be fixed. Following the decision of a Division Bench of this Court in *Angamuthu Mudaliar* v. *Ratna Mudaliar*[1], the learned Munsif dismissed the petitioner's application, holding that an application under section 3 of the Partition Act would not lie after an order for sale under section 2 of the Act had been passed by the Court. The learned Munsif has stated that he is bound by the Bench decision of this Court and has consequently declined to follow the contrary view taken by the Calcutta High Court in *Nitish Chandra Ghosh* v. *Promode Kumar Ghosh*[2]. He pointed out that no decision of this Court subsequent to *Angamuthu Mudaliar's case*[1], had been cited before him. This is evidently wrong, as the leaned Counsel for the petitioner rightly points out for, in *Jayarama* v. *Annamalai*[3], Kailasam, J., has declined to be bound by the Bench decision in *Angamuthu Mudaliar's Case*[1] and has preferred *Nitish Chandra Ghosh* v. *Promode Kumar Ghosh*[2], cited above. Kailasam, J., has taken the view that the observations made by the Division Bench of this Court in *Angamuthu Mudaliar's Case*[1] were *obiter* and are also not warranted by the provisions of sections 2 and 3 of the Partition Act (IV of 1893).

3. The learned Counsel for the petitioner contends that the decision of Kailasam, J., is binding on me, as it is a decision of a Judge of co-ordinate jurisdiction of this Court and relies for that proposition upon the judgment of the Supreme Court in *Dhanki Mahajan* v. *Rana Chandubha*[1], wherein the Supreme Court has ruled that a single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of co-ordinate jurisdiction or Division Benches and Full Benches of his Court.

4. I have gone through the judgment of the Division Bench of this Court in *Angamuthu Mudaliar's case*[2], cited above ; and I regret to say that I am unable to agree with Kailasam, J., that the observations made in that judgment are *obiter* in nature and will not consequently bind him. I am also satisfied that these observations contain a correct statement of the law and that the construction placed by the Calcutta decision cited above and by Kailasam, J., is not warranted by the provisions of sections 2 and 3 of the Partition Act.

5. The material facts in *Angamuthu Mudaliar's case*[2], were these. In a partition suit, a consent decree was passed embodying a direction by consent of parties that the Official Referee should divide the property by metes and bounds and that, if it could not be so divided, he should sell the property under the Partition Act (IV of 1893). Under the decree, the plaintiff was entitled to a half share. The Official Referee found that the property was not capable of division by metes and bounds and decided to sell the property. The plaintiff thereupon made an application to the Court under section 3 of the Partition Act for leave to purchase the shares of the defendants and requested the Court to fix the value of the said shares. The application was dismissed ; but a Division Bench of this Court set aside that

1. (1925) I.L.R. 48 Mad. 920 : 49 M.L.J. 411 : A.I.R. 1925 Mad. 1234.
2. A.I.R. 1953 Cal. 18.
3. I.L.R. (1966) 2 Mad. 530.

1. (1969) 1 S.C.J. 157 : (1968) 3 S.C.R. 759 : A.I.R. 1969 S.C. 69.
2. (1925) I.L.R. 48 Mad. 920 : 49 M.L.J. 411 : A.I.R. 1925 Mad. 1234.

order and remanded the case back to the Official Referee for disposal according to law. Subsequently the defendants also applied under section 3 of the Partition Act, offering to purchase the house at the valuation fixed by the Official Referee ; and in the alternative he prayed that the house should be sold to the shareholders who offered the highest price and that the sale should be held by the Official Referee as between the shareholders. The application was allowed; but the learned Judges who constituted the Bench allowed the appeal, dismissed the application and made certain observations of which portions relevant to the present enquiry are set out below :

> "It is clear to our minds that section 3 of the Partition Act cannot be applied after the Court had already directed a sale and in this case the sale was with the consent of all parties. The sale which was directed was a sale under section 2 of the Partition Act. Section 3 begins by saying "If, in any case where the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or the shares of the party asking for a sale, the Court shall order a valuation."

6. It seems to us therefore that the proper time to apply under section 3 is before a Court makes an order under section 2, and after the request had been made by one of the parties that the property should be sold. Unless we construe the two sections in this manner there will be much difficulty in applying them. Once a final order is made as between the parties that the property should be sold under section 2, and that means a sale open to the public when anybody might bid for the property unless it is expressly restricted to be between the parties only, no order can be made under section 3, as it is too late then to apply under that section.

* * * *

In this case section 3 does not apply. The parties have already agreed that the properties should be sold under section 2 and that consent has not been set aside by any order and is still in focre.

It appears to me clear that a construction of the provisions of sections 2 and 3 were necessary for an effective disposal of the dispute between the parties by the Division Bench. It is true that the learned Judges have observed that the parties have already agreed that the properties should be sold under section 2 and that consent has not been set aside by any order and was still in force ; but the learned Judges have also prefaced those observations by the remark that, in that case section 3 did not apply. The implication of this remark is clear and it is that, in the opinion of the learned Judges, if section 3 applied to the case, the fact that the parties have already agreed that the properties should be sold under section 2 would not have been a bar to the applications made by the plaintiff and the defendants in the case under section 3 of the Act. As set out earlier, the learned Judges have held that, once a final order is made as between the parties that the property should be sold under section 2 and that means a sale open to the public when anybody might bid for the property unless it is expressly restricted to be between the parties only, no order can be made under section 3, as it is too late then to apply under that section. The learned Judges have further held that the consent order between the parties which is to the effect that the property should be sold under the Partition Act unless the Official Referee found it convenient to divide it by metes and bounds must be deemed to be one under section 2 of the Partition Act and that the subsequent applications by the plaintiff and the defendants under section 3 could not be entertained because the consent order must be a final order under section 2 and that it was too late to come in with an application under section 3. In my view, construction of sections 2 and 3 of the Act by the Division Bench was necessary for an effective disposal of the question faced by the learned Judges whether applications under section 3 filed subsequent to the consent order that the property should be sold by the Official Referee would lie. It appears to me that the learned Judges have not dismissed the applications by the plaintiff and the defendants under section 3 of the Act on the ground that they were bound by

the consent order that the sale should take place. It was not disputed in that case that the Partition Act applied, and it does not appear from the judgment that any argument was advanced by any of the parties to the effect that as the consent order was binding between the parties no relief under section 3 was therefore available. Indeed it is obvious that no such argument could have been advanced, as both the plaintiff and the defendants have admittedly filed applications under section 3 of the Act.

7. In my view, the real basis of the decision by the learned Judges in that case was this: The order for a public sale under section 2 is final and, consequently, so long as that order stands, no subsequent applications under section 3 by any party to the decree praying for a sale of the shares of the other parties in his favour is entertainable. The consent order in that case for a sale must be deemed to be one under section 2 of the Act and consequently applications by the plaintiff and defendants under section 3 of the Act (subsequent to the consent order) for sale of the shares of the other parties in their favour are not legally maintainable. The observations of the learned Judges that once a final order is made as between the parties that the property should be sold under section 2 and that means a sale open to the public, no order can be made under section 3, as it is too late then to apply under that section cannot, therefore in my view, be viewed as obiter but must be taken to be the basis for the decision and binding on Kailasam, J.

8. In the second place, it also appears to me that the observations made by the learned Judges are based upon a correct interpretation of the provisions of sections 2 and 3 of the Act. Section 3 (1) of the Act is to the following effect. "If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner.........." In my view the language used implies that applications under section 3 can be entertained only so long as the application under section 2 for sale of the property is still pending and has not been finally ordered. If the application under section 2 had been allowed and a public sale had been ordered, it would be anomalous to allow a subsequent application under section 3 for a sale of the shares of some parties to the applicant, so long as the order for public sale stands and has not been set aside. An order for the sale of the shares of one party to another cannot subsist and stand side by side with an order for a public sale. I am therefore unable to subscribe to the view taken by the Calcutta High Court and by Kailasam, J., that an application under section 3 of the Act can be entertained so long as a sale had not been held in pursuance of the order under section 2 of the Act.

9. In view of the fact that I am unable to follow the decision of Kailasam, J., on the binding nature of the decision of this Court in *Angamuthu Mudaliar* v. *Ratna Mudaliar*[1], as well as on the effect of the provisions of sections 2 and 3 of the Indian Partition Act, it is but proper that both questions should be referred to a Bench for adjudication. Accordingly, the following two questions are formulated for a decision by a Bench :

"(1) Whether the observations of the Division Bench in *Angamuthu Mudaliar* v. *Ratna Mudaliar*[1], that the proper time to apply under section 3 of the Partition Act is before a Court makes an order under section 2 of that Act and that once a final order is made as between the parties that the property should be sold under section 2 and that means a sale open to the public when anybody might bid for the property unless it is expressly restricted to be between the parties only, no order can be made under section 3, as it is too late then to apply under that section, are obiter, and, in case they are not obiter,

(2) Whether the said observations do not contain a correct statement of the law."

10. The papers will be placed before the Hon'ble the Chief Justice for being

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1. (1925) I.L.R. 48 Mad. 920 : 49 M.L.J. 411 : A.I.R. 1925 Mad. 1234.

referred to a Division Bench or a Full Bench.

The Judgment of the Court was delivered by

Veeraswami, C. J.—The matter comes before us on a reference by Ganesan, J. The learned Judge thought that there was a conflict of decisions and therefore it should be resolved. But on the view we are inclined to take there is no conflict of decisions. The question is at what stage an application under section 3 (1) of the Partition Act of 1893, should be made: is it before an order has been made under section 2, or can application under section 3 (1) be made even thereafter, but before the sale is actually held. That is how the question has been propounded by the referring Judge.

12. On a plain reading of sections 2 and 3, it seems to us that the right to apply under section 3 (1) arises the moment a request has been made under section 2. If a direction for sale of the property has been given under section 2, it does not follow that an application under section 3 (1) cannot be made thereafter. All that is necessary is that in order that an application under section 3 (1) may be considered, the petitioner should apply to have the order under section 2 set aside because, so long as that order stands, the application under section 3 (1) does not call for consideration. It may be even visualised that a sale has taken place under section 2. Even in such a case, as it seems to us, there is no bar to be inferred from the two sections to an application being made under section 3 (1), but only it cannot be considered, unless the order for sale made under section 2 is set aside. That we think is the correct approach. We do not think that the question was considered in *Angamuthu Mudaliar* v. *Ratna Mudaliar*[1]. As to *Jayarama* v. *Annamalai*[2], we agree with Kailasam, J., that a right to apply under section 3 (1) accrues the moment a request under section 2 has been made to the Court. Beyond that stage, an application may always be permissible, but only, as we said, any order made under section 2, or sale held pursuant to that order will have to get out of the way first before an application under section 3 (1) can be taken up for consideration.

13. On that view of the matter, we set aside the order of the Court of the District Munsif and remit the application under section 3 (1) to the Court for disposal, along with any aplication which the petitioner may have filed for setting aside the order for sale under section 2. If no such application is made to set aside the order under section 2, the application under section 3 (1) will naturally have to be dismissed.

14. The petition is accordingly ordered. No costs.

S.J. —— *Petition allowed.*

1. I.L.R. (1925) 48 Mad. 920 : 49 M.L.J. 411 : A.I.R. 1925 Mad. 1234.
2. I.L.R. (1966) 2 Mad. 530.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

Sivanandam .. *Appellant.**

v.

Ramabadra Reddy and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), section 21—Judgment-debtor adjudicated insolvent—Insolvency proceedings continuing—Application by son to scale down debt—Son not party to suit and not adjudicated insolvent—Maintainability of application—Proper section applicable—Section 21—Meaning of 'any other person interested' in section 21 (2).

Where a judgment-debtor against whom a money decree had been passed was subsequently adjudicated insolvent and while the insolvency proceedings were still in progress, a son of the judgment-debtor, who was not a party to the suit and who was not adjudicated an insolvent, either, applied for scaling down the decree-debt under the Madras Agriculturists Relief Act, the proper section applicable is section 21 and not section 19 of the Act. [*Para.* 3.]

*A.A.A.O. No. 147 of 1971. 19*th December*, 1973.

All that section 21 requires is that the person applying for scaling down should be a person 'interested' in the scaling down. The son of the judgment-debtor who made the application was certainly a person interested in getting his father's debt scaled down. The petition is, therefore, competent and maintainable. [*Para.* 3.]

Appeal against the order of the Court of the District Judge, North Arcot at Vellore, dated 20th July, 1971 and made in C. M. A. No. 10 of 1971 reversing the order and decretal order of the District Munsif, Ranipet, dated 3rd October, 1970 and made in I. A. No. 599 of 1961 in O. S. No. 515 of 1934.

R. Gopalaswami Ayyangar, for Appellant.

P. R. Varadarajan, for Respondents.

The Court delivered the following

JUDGMENT:—This appeal arises under the following circumstances: On the 12th September, 1935 one Ramabadra Reddiar obtained a decree against Govindaraju Nadar (D-1) Doraiswami Nadar (D-2) and minor Vasudeva Nadar (D-3) whereby defendants 1 and 2 were directed to pay personally, and all the defendants to pay, out of the family properties, a sum of Rs. 2,856 with interest on Rs. 2,100 at 12% per annum from 16th April, 1934 from the date of the plaint upto the date of the decree. The decree further ordered the defendants to pay a sum of Rs. 425 as costs to the plaintiff with interest on the aggregate sum at the rate of 6% per annum from the date of the decree upto the date of realisation. Subsequently Ramabadra Reddiar transferred part of the decree in favour of one Annamalai Mudaliar. Sivanandam who is one of the sons of Govindaraju Nadar (D-1) and who was not a party to the suit in O. S. No. 515 of 1934, filed in March, 1961 a petition under section 19 of Madras Act IV of 1938 in I. A. No. 599 of 1961 for scaling down the debt due by his father under the decree. Ramabadra Reddiar was impleaded as the first respondent and Annamalai Mudaliar as the second respondent in the interlocutory application. It appears that in I. P. No. 11 of 1935 Govindaraju Nadar and Doraiswami Nadar, defendants 1 and 2 in O. S. No. 515 of 1934 were adjudged as insolvents. Consequently, the Official Receiver, North Arcot, was impleaded as the third respondent in the interlocutory application. In this application, Sivanandam, the appellant before me, contended that as a member of the agricultural family of Ramabadra Reddiar he was entitled to file this application for scaling down and that no amount would be due under the decree if it were properly scaled down. Ramabadra Reddiar in his counter contended *inter alia* that the petitioner was not competent to apply for scaling down at all, that he was not an Agriculturist entitled to apply and that he had no saleable interest in the land, inasmuch as the entire family property had vested in the Official Receiver in insolvency. He further pointed out in his counter that section 19 of the Tamil Nadu Agriculturists Relief Act had no application and that inasmuch as Govindaraju Nadar and his brother had been adjudged as insolvents in I. P. No. 11 of 1935 on the file of the Sub-Court, Vellore, the proper provision applicable would be section 21 of the Act and that this application ought to be made either by the insolvent-debtor or the Official Receiver. The second respondent, who was the assignee-decree holder, raised a number of contentions, some of which were a repetition of those raised by the first respondent. The Official Receiver, who was the third respondent in the interlocutory application, filed a memo. to the effect that he had no counter to file.

2. The learned District Munsif, Ranipet, after recording documentary and oral evidence and upon a review of the evidence, came to the conclusion that Govindaraju Nadar's family including his son, the petitioner, was in possession of agricultural lands on the three relevant dates, *viz.*: (1) the date when the debt came into existence; (2) 1st October, 1937; and (3) the date on which the petition to scale down the decree debt was filed. After recording these findings he proceeded to indicate the mode in which the debt should be scaled down and directed the parties to file memoranda of calculation on the lines suggested by the Court. No memo. was filed. Against this order Annamalai assignee decree holder preferred an appeal to the Dis-

trict Judge of North Arcot. The learned District Judge after holding that an agriculturist as defined in Madras Act IV of 1938 is a 'complicated person' introduced a further complication in the proceedings between the parties by holding that in as much as all the properties of the family of the judgment-debtors had vested in the Official Receiver long prior to the institution of I. A. No. 599 of 1961, the son of the insolvent, who was the applicant, could have no saleable interest in the agricultural property, such as to qualify him for filing an application under the Act. In this view, the first appellate Court set aside the District Munsif's order directing the scaling down of the decree debt and dismissed the petition for scaling down with costs throughout. It is against this order that Sivanandam the applicant, has preferred this appeal.

3. It is not disputed that Govindaraju Nadar, the father of Sivanandam, has been adjudicated as an insolvent. From the fact that the Official Receiver appeared in Court and filed a memo. saying that he had no objection to the scaling down, it may be presumed that insolvency proceedings are still in progress and that there has been no annulment of adjudication. It is not known if at the time of adjudication the power of Govindaraju Nadar to sell the joint family property in discharge of the joint family debts also vested in the Official Receiver along with Govindaraju Nadar's share in the joint family property. Even if it had vested, it is not known whether the Official Receiver had exercised that power. But in the view that I take of the competency of the appellant, it is unnecessary to go into the question whether the appellant had any saleable interest in the agricultural lands at all at the time he filed his application for scaling down. As pointed out in the counter-affidavit of the first respondent in the trial Court the proper, section applicable is not section 19 but section 21 of the Act. Section 21 of the Act is in the following terms :—

"21. (1) Nothing contained in this Act shall apply to the debts payable by any person who has been adjudicated an insolvent, if prior to the coming into force of this Act, a dividend has been declared out of his assets.

(2) If a dividend has not been so declared, the Court shall, on application made by the insolvent debtor, the Official Assignee or Official Receiver in whom the property of such debtor has vested, or any other person interested, apply the provisions of this Act to the debts payable by the insolvent debtor if he would have been an agriculturist within the meaning of this Act but for his adjudication in insolvency."

Counsel are unable to say if a dividend had been declared out of the assets even prior to the institution of this petition. This is a matter which requires investigation. If a dividend has not been been declared, it is clear that the Court shall scale down the debt on an application made by anyone of the following 3 categories of persons: (1) insolvent debtor; (2) Official Assignee or Official receiver; and (3) any other person interested. It is clear from the language of this section that where there has been an adjudication of the judgment debtor as an insolvent, it is not necessary that the person who applies for scaling down the debts should have a saleable interest in agricultural lands. The insolvent debtor who is enabled under that section to apply, cannot be said to have saleable interest in the lands after adjudication and after the entire estate has vested in the Official Receiver, nor "any other person interested mentioned in clause (2) of the section need be a person having a saleable interest in the agricultural land. All that the section requires is that he should be a person interested in getting the debt scaled down. The son of the judgment-debtor, who made the application, is admittedly a member of the family of the insolvent. He has not been adjudicated as an insolvent either and he is certainly a person interested in getting the decretal debt of his father scaled down under Madras Act IV of 1938. The learned District Judge, therefore, fell into an error in thinking that the petitioner was not competent to file an application because in his view he was not an agriculturist within the meaning of the Act and he had no saleable interest in the agricultural lands.

In the absence of relevant material, I am unable to agree even with this view of the learned District Judge, that the petitioner had no saleable interest in the agricultural lands. Even assuming that he did not have such an interest, he would be certainly a person interested, within the meaning of section 21 clause (2) of the Act.

4. I, therefore, reverse the finding of the District Judge and remand the matter to the first appellate Court with a direction to dispose of the appeal on the merits on the basis that the petitioner in I. A. No. 599 of 1961 is competent as an interested person to maintain that petition. The costs of this appeal will abide the result of C. M. A. No. 10 of 1971.

Ordered accordingly

P.S.P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—*C. J. R. Paul, J.*

In the matter of the Indian Succession Act XXXIX of 1925

and In the matter of the debt of T. Pachiappa Mudaliar, Intestate—deceased.

Mohanaprakasam (minor) Represented by guardian Sarojini

.. *Petitioner**

Indian Succession Act (XXXIX of 1925), sections 371 and 370—Issue of succession certificate—Jurisdiction to issue—Basis of.

Under section 371 of the Indian Succession Act the jurisdiction of the Court to grant a succession certificate is made to depend upon one of two circumstances namely, either ordinary residence of the deceased at the time of his death or in the absence of any fixed place of residence the situation of any part of the property within the jurisdiction of the Court to which the application is made. The second part of section 371, that is, the jurisdiction arising by reason of the situation of the property of the deceased within the jurisdiction of the Court to which the application is made, would come into operation only if the deceased had no fixed place of residence.

[*Para.* 3.]

Section 300 of the Indian Succession Act cannot be invoked in the instant case in support of the petition for the issue of a succession certificate mechanically by the High Court for that section occurs in Chapter IV of Part IX whose heading is "of the practice in granting and revoking probates and letters of administration" ; whereas succession certificates are dealt with in part X of the Indian Succession Act. [*Para.* 3.]

K. Srinivasan and *V. R. Gopalan,* for Petitioner.

The Court made the following

ORDER.—A petition under section 370 of the Indian Succession Act has been filed by one Sarojini as guardian of a minor for the grant of succession certificate. It is stated in that petition that one Pachayappa Mudaliar who was ordinarily residing at Chingleput died intestate at Chingleput on 18th December, 1958 leaving behind the property mentioned in the petition and leaving behind as his heirs the petitioner who is the widow of his pre-deceased son, his grandson Mohanaprakasam and his second son Thillai Natarajan and that even during the lifetime of the deceased a partition suit was filed by the petitioner and her minor son in C.S. No. 109 of 1954 on the file of this Court against the late Pachayappa Mudaliar and his wife and Thillai Natarajan and in and by a decree, dated 3rd January, 1957 this Court allotted certain items to the minor Mohanaprakasam and three life insurance policies which are the subject-matter of this petition were directed to be assigned by the deceased Pachayappa Mudaliar in favour of Mohanaprakasam, but before the assignmentdeed was executed Pachayappa Mudaliar died and an assignment deed was executed by the heirs of the deceased on 6th July, 1961 ; but the Life Insurance Corporation declined to act upon the decree passed in C.S. No. 109 of 1954 or the assignment deed without a succession certificate.

2. The office returned the petition with an endorsement as follows : "Since the

*Diary No. 9051 of 1973. *3rd January,* 1974.

deceased was not an ordinary resident within the jurisdiction of this Court at the time of his death, it may be stated how this petition can be filed in this Court without any impediment to the provisions of section 371 of the Indian Succession Act." The petition was represented with the following endorsement: "In C.S. No. 109 of 1954 on the file of this Hon'ble Court, this particular item was allotted to the minor. Although normally the Life Insurance Corporation could act on the decree copy, they still want a succession certificate. As this Honourable Court in exercise of its original jurisdiction has allotted this item to the minor, I submit that this Court can issue succession certificate. If there is doubt the matter may be posted before Court." Hence the matter was posted for hearing the Counsel for the petitioner and I have heard the counsel for the petitioner.

3. Section 371 of the Indian Succession Act reads as follows: "The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time he had no fixed place of residence, the District Judge, within those jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part." Admittedly the deceased ordinarily resided at the time of his death within the jurisdiction of the District Judge of Chingleput and as such it is the District Judge of Chingleput who has to issue the succession certificate. Only if at the time of his death the deceased had no fixed place of residence then the jurisdiction of the Court will have to be determined with reference to the situation of the property of the deceased. In this case it cannot be said that the deceased had no fixed place of residence the at the time of his death. I find that in the petition itself it is alleged that Pachayappa Mudaliar ordinarily resided in Chingleput and died at Chingleput. Under section 371 of the Indian Succession Act the jurisdiction of the Court is made to depend upon one of the two circumstances, namely, either ordinary residence of the deceased at the time of his death or in the absence of any fixed place of residence the situation of any part of the property within the jurisdiction of the Court to which the application is made. The second part of section 371 of the Act, that is the jurisdiction arising by reason of the situation of the property of the deceased within the jurisdiction of the Court to which the application is made, would come into operation only if the deceased had no fixed place of residence. If the deceased had a fixed place of residence elsewhere, the fact that his properties are situated within the jurisdiction of the Court to which the application is made, would not confer jurisdiction on the Court within whose jurisdiction the properties are situated. The ordinary circumstance which gives rise to jurisdiction is that of residence ordinarily within the local limits of the Court's jurisdiction at the time of the death. The second provision granting jurisdiction is a mere alternative and applies only to those cases where the deceased at the time of his death had no fixed place of residence at all. Section 300 of the Indian Succession Act cannot be invoked in support of this petition for the issue of a succession certificate mechanically in this Court for that section occurs in Chapter IV of Part IX whose headings is "of the practice in granting and revoking probates and letters of administration and section 300 says that the High Court shall have concurrent jurisdiction with the District Judge. Sub-section (2) of section 300 and the notification contemplated thereunder make the position clear. Succession certificates, it must be remembered are dealt with in Part X of the Indian Succession Act.

4. It is however contended by the learned Counsel that inasmuch as in C.S. No. 109 of 1954 on the file of this Court a decree has been passed whereby certain items have been allotted to the minor Mohanaprakasam and directions have been given to the deceased to assign three life insurance policies in favour of the minor, this Court could deal with the matter. But the fact that in that suit a decree was passed with reference to some of the properties specified in the schedule to this petition would not confer jurisdiction on this Court to issue a succession certificate in view of the clear provisions of section 371 of the Indian Succession Act Hence this petition is ordered to be returned for presentation before the proper Court.

R.S. —— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—*K. Veeraswami, C.J. and A. Varadarajan, J.*

The State of Madras represented by the Secretary to Government, Home Department, Madras-9 ... *Appellant**

v.

Periakkal and others .. *Respondents.*

Kamalambal and another .. *Petitioners*

v.

The State of Tamil Nadu represented by the Secretary to Government, Social Welfare Department, Madras-9. and another .. *Respondents.*

Land Acquisition Act (I of 1894), sections 5-*A*, 55 (c), rule 3 (b) *of the Rules framed under the Act—Land acquisition proceedings—Acquisition f r Harijan Welfare Department—Notice of objections not given to Harijan Welfare Department—Validity of proceedings—" Shall" in rule* 3 (*b*)*—Directory and not mandatory—Tahsildar initiating proceedings competent to make enquiry under section* 5-*A—Departmental bias immaterial.*

Notwithstanding the use of the expression " shall " in rule 3 (*b*) of the Rules framed under section 55 (1) of the Land Acquisition Act, the rule is merely directory and not mandatory.

[*Para.* 2.]

Bias is related to a decision and a Tahsildar initiating Land Acquisition proceedings hardly contributes to any decision under section 5-A of the Land Acquisition Act

[*Para.* 4.]

Cases referred to:—

P. Chockalinga Mudaliar v. *State of Madras, represented by the Collector of North Arcot at Vellore and others,* (1972) 2 M.L.J. 196; *Lonappan* v *Sub-Collector, Palghat,* A.I.R. 1959 Ker. 343; *Ram Chandran Lal* v. *State of Uttar Pradesh,* A.I.R. 1959 All. 752.

W.A. Nos. 524 *to* 527 *of* 1971.—Appeals under clause 15 of the Letters Patent respectively against the Order of the Honourable Mr. Justice Ismail, dated 9th April, 1970 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petitions Nos. 138, 137, 48, 128 of 1969 presented under Article 226 of the Constitution of India to issue writ of *certiorari* calling for the records relating (1) to the order of the 1st respondent therein in G.O.R. No. 4346 Home, dated 20th September, 1968 issued under section 6 of the Land Acquisition Act published in *Fort St. George Gazette* in Part II, section 1, dated 18th December, 1968 at page No. 2065 in respect of 1/2 share of the petitioner in W.P. No. 138 of 1969, 1/4 share of the petitioner in W.P. No. 137 of 1969, 1/4 share of the petitioner in W.P. No 128 of 1969, in 1.78 acres in Survey No. 248/1-A in Mamundi Agraharam Village, Tiruchengode Taluk, Salem District and to quash the said G.O. in W.P. Nos. 138, 137 and 128 of 1969 respectively, (2) calling for the records relating to the Gazette Notification G.O.R No. 4948, Home, dated 2nd September, 1968 issued under section 6 of the Land Acquisition Act and published in the *Fort St. George Gazette*, dated 20th November, 1968 in Part II, section 1 at pages 1933 and 1934 and to quash the same in W.P. No. 48 of 1969.

W.Ps Nos. 3427 *and* 3542 *of* 1970.—Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed with W.P. Nos. 3427 and 3442 of 1970 on the file of the High Court, the High Court will be pleased to issue writ of *certiorari* calling for the records relating to the Notification (1) G.O.R. No. 1881, Social Welfare, dated 18th July, 1970 and published in the *Tamil Nadu Government Gazette,* dated 5th August, 1970, in part II, section 1 at pages 1315 and 1316, and to quash the same in W.P. No. 3427 of 1970, (2) G.O.R. No. 2075, Social Welfare Department, dated 6th August, 1970 issued under section 6 of the Land Acquisition Act published in the *Tamil Nadu Government Gazette,* dated 23rd September, 1970, Part II, section 1 at pages 1525 and 1526 in respect of S. No. 163/6 in T. Athipakkam Village, Tirukoilur Taluk, South Arcot District and to quash the same in W.P. No. 3542 of 1970

* W.A.Nos. 524 to 527 of 1971 and W.P. Nos. 3427 and 3542 of 1970. 18*th September,* 1973.

The Government Pleader for Appellants in W A No 524 to 527 of 1971 and Respondent in W.P. No. 3427 of 1970 and 3542 of 1970.

T. Rangaswami Ayyangar, for Respondents in W.A. No. 526 of 1971 and Appellant in W.P. 3427 of 1970.

V. T. Gopalan and *S. Rajagopalan*, for Appellants in W.P. No. 3542 of 1970.

The Judgment of the Court was delivered by

Veeraswami, C.J.—The land acquisition proceedings in these cases have been quashed on two grounds : (1) that rule 3 (*b*) of the rules framed under section 55 (1) of the Land Acquisition Act had not been followed inasmuch as no notice was given of the objections as required by the rule to the Harijan Welfare Department at whose instance the acquisition was initiated ; and (2) that there was departmental bias inasmuch as the same Tahsildar, who did the survey, etc., and initiated the proceedings, also held the enquiry under section 5-A of the Act. The acquisition in these cases was for providing house-sites for Harijans.

2. We are not impressed by either of the objections to the validity of the land acquisition proceedings. There are hardly any facts to show that the respondents had in any way been substantially prejudiced by the failure to serve notice on the Harijan Welfare Department. The record shows that it was at the instance of the Harijan Welfare Department that the proceedings were initiated for acquisition. But it is contended that if notice had been given to that Department, it might as well have accepted an alternative site. That was only a mere chance. Notwithstanding the use of the expression 'shall' we are of opinion that the rule is merely directory and not mandatory. That was the view taken in W.P. Nos. 1099 and 1123 of 1961, which was accepted by a Division Bench of this Court in *P. Chockalinga Mudaliar* v. *State of Madras represented by the Collector of North Arcot at Vellore and others*[1]. One of us dealt with the matter thus :

"The next contention urged is founded on rule 3 (*b*) of the Rules framed under section 55 (1) of the Land Acquisition Act. It is contended that no notice under section 5-A was at all given to the Telephone Department requiring the land. Reliance is placed upon *Lonappan* v. *Sub-Collector, Palghat*[1] and *Ram Chandran Lal* v. *State of Uttar Pradesh*[2] in support of this contention. But I do not see how even assuming that no notice went to the Department, the petitioners were in any way affected. The facts and circumstances of this case clearly show that the Department needed the land with the building thereon for the purpose of the Telephone Exchange. In my opinion, the failure to give notice to the Department and thereby conforming to rule 3 (*b*) is not such irregularity as will necessarily invalidate the acquisition. The test should in every case be whether the failure has caused substantial prejudice to the aggrieved persons. On this view, I consider that there is no substance in this contention either."

Subsequently, this view, as we said, has been accepted in *P. Chockalinga Mudaliar* v. *State of Madras represented by the Collector of North Arcot, Vellore and others*[3].

Under section 4 (1), a notification is to be published to that effect whenever, it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose. Any person interested in any land which has been notified under section 4 (1), as we see from section 5-A (1), may, within the time specified, object to the acquisition of the land or of any land in the locality, as the case may be. The objection is to be made to the Collector in writing, and the latter shall give the objector on opportunity of being heard either in person or by pleader, and after hearing of such objections and after making such further enquiry, if any, as he thinks necessary shall make a report to the appropriate, Government, which shall finally decide. It is in the context of this scheme of things that the scope and effect of rule 3 (*b*)

1. (1972) 2 M.L.J. 196.

1. A.I.R. 1959 Ker. 343.
2. A.I.R. 1959 All. 752.
3. (1972) 2 M.L.J. 196.

will have to be determined. Rule 3 (*b*) says :

> " If any objections are received from a person interested in the land and within the time prescribed in sub-section (1) of section 5-A, the Collector shall fix a date for hearing the objections and give notice thereof to the objector as well as to the department or company requiring the land, where such department is not the Revenue Department. Copies of the objections shall also be forwarded to such department or company. The department or company may file on or before the date fixed by the Collector a statement by way of answer to the objections and may also depute a representative to attend the enquiry."

3. It is no doubt true that as required by the rule, the Collector shall give notice of the objections to the department requiring the land, and copies of the objections shall also be forwarded to such department. This is for enabling the department to file on or before the date fixed by the Collector a statement by way of answer to the objections and also depute a representative to attend the enquiry. It may be seen, therefore, that the department requiring the land may have an opportunity of traversing the objections, if any, filed by the person interested in the land, so that in the light of the reply of the department a decision may be arrived at for the purpose of making the declaration under section 6. We do not think that the suggestion made for the respondents that if this procedure had been followed the Harijan Welfare Department might have possibly accepted an alternative site has any bearing upon the interpretation of the actual scope and effect of the rule. Having regard to the purpose of the acquisition, namely, to provide house sites for Harijans, and there being no substantial material to accept any alternative choice and the rule, in our opinion, being not maudatory, its effect is that in the absence of substantial prejudice, the acquisition proceedings are not invalidated.

4. The other ground seems to be even less substantial. We are unable to understand what kind of bias the Tahsildar could have had which would have an effect upon any decision for the purposes of section 6. Departmental bias in our view, seems to be a very vague thing. What is stated is that the Tahsildar in these cases having initiated the land acquisition proceedings at the instance of the Government, may be biased in making the enquiry under section 5-A. We can hardly visualise any such bias on the part of the Tahsildar. He is not personally interested or motivated to form any bias. Merely because the department initiated a certain thing, it does not follow that the action is vitiated by what is stated as departmental bias. Something more is required in order to invalidate the acts of the Tahsildar on the ground of bias.

Further, bias is related to a decision and the Tahsildar hardly contributes to any decision under section 5-A. He receives objections, hears the parties and conveys his own view in relation to what he has heard. The consolidated report which he sends will be no doubt the subject-matter for the Government to consider. The decision ultimately is with the Government and is of the Government. We are, therefore, not impressed by this ground of departmental bias.

5. The appeals are allowed. No costs.

6. The writ petitions are dismissed. No costs.

S.J. *Appeals allowed;*
Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Natarajan., J.*

The State of Madras represented by the Collector of Thanjavur .. *Petitioner**

v.

K. G. Ramani Iyer and others .. *Respondents.*

Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), sections 3 (32), 73 (vii)—*Claim of exemptions from the Act—Orchards—Plantain trees—Whether fruit-bearing trees —Meaning of section* 73 (vii).

Plantain is not a fruit-bearing tree as contemplated in section 3 (32) of the Madras Land Reforms (Fixation of Ceiling on Land) Act. It necessarily follows that the enclosure wherein the crop is raised would not be an orchard and, the landowners will not be entitled to claim exemption from the provisions of the Act under the cover of section 73 *(vii)*. [*Para.* 5.]

Obiter. In order to derive the benefit conferred by section 73 (vii) of the Madras Land Reforms (Fixation of Ceiling on Land) Act, an applicant must not only prove that the land in respect of which exemption is sought for was converted on or before 1st day of July, 1959 into an orchard tope or arecanut garden, but he must further show that from the date of conversion, the said land had continued to be maintained as an orchard tope, arecanut garden till such time the exemption is asked for. [*Para.* 3.]

Cases referred to :—

Akshvanathaswami Devasthanam v. *Ramaswami Reddiar,* (1971) 84 L.W. 335 ; *Govindasami Padayachi* v. *Suryanarayanaswami,* (1971) 84 L.W. 369.

Petition under section 83 of Madras Act (LVIII of 1961) praying the High Court to revise the order of the Subordinate Judge, (Land Tribunal) Mayuram, dated 30th September, 1969 and made in L.T. No. C.M.A. 2 of 1968 (M.R. 1.14 *(a)*/NNL. dated 18th November, 1967 on the file of the Authorised Officer (Land Reforms) Mayuram.

*G.R.P. No. 1825 of 1972. 10*th January,* 1974.

N. Thiagarajan, the Assistant Government Pleader, for Petitioner.

P. Veeraraghavan, for Respondent.

The Court made the following

ORDER.—The respondents' case that their lands in R.S. Nos. 41/4, 82/5 and 82/6 are exempt from the operation of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961, hereinafter referred to as the Act, on the ground that they are orchards, was not accepted by the Authorised Officer, Land Reforms, Mayuram. But, on appeal, the Land Tribunal (The Subordinate Judge of Mayuram) accepted the contention of the respondents and allowed their appeal. It is to canvass the correctness of the judgment of the Tribunal that the State of Madras represented by the Collector of Thanjavur has preferred this revision petition.

2. The learned Additional Government Pleader raises two contention in support of the petitioner's case that the order of the Tribunal is wrong and erroneous. It is firstly argued that the respondents have not adduced proof to show that the lands in question continued to be orchards from the date of their conversion as orchards on or before 1st day of July, 1959, which is the stipulated date under section 73 (vii) of the Act and that, without such proof being adduced, the respondents are not entitled to claim exemption from the operation of the Act. The second ground that is urged is that the growing of plantains will not constitute an orchard as defined in section 3 (32) of the Act.

3. In support of the first contention it is pointed out that, though the adangal extract for Fasli 1368 makes reference to plantain cultivation in R.S. No. 41, the respondents have not produced the adangal extract for the subsequent faslis and that the adangal extract produced for Fasli 1376 evidencing plantain cultivation in all the three survey numbers cannot be taken to mean that in between 1968 and Fasli 1376 plantain cultivation had been done in all the three survey numbers

without break. The learned Counsel for the respondents refutes the contention of the learned Additional Government Pleader in this behalf and points out that according to the evidence of P.W. 1, the karnam, the respondents had been raising plantain crops in the three survey numbers for the last twenty years. Apart from that, the further contention of the learned Counsel for the respondents is that the proviso to section 73 (*vii*) does not stipulate that the landowner claiming exemption under that section should give proof that there has been continuous planting of plantains in the land for which exemption is sought for, from a period prior to 1st July, 1959 to such period when the Act came into force. *Prima facie*, the contention of the learned Counsel for the respondents in this behalf does not appear to be sound.

Section 73 (*vii*) and the proviso read as follows :

> " Except as otherwise provided in sub-sections (2) and (3) of section 5 and in section 6, nothing contained in this Act shall apply to (vii) lands converted on or before the 1st day of July, 1959, into orchards or topes or arecanut gardens, whether or not such lands are continuous or scattered ; Provided that such lands shall be exempt only so long as they continue to be orchards, topes or arecanut gardens."

A reading of the section and the proviso lend support to the contentions of the learned Additional Government Pleader that in order to derive the benefit conferred by section 73 (*vii*), the applicant must not only prove that the land in respect of which exemption is sought for was converted on or before 1st day of July, 1959 into an orchard or tope or arecanut garden, but that he must further show that from the date of conversion, the said land had continued to be maintained as an orchard, tope or arecanut garden till such time the exemption is asked for. The oral evidence of the karnam, without documentary evidence in the shape of adangal extracts, cannot establish the case of the respondents that the three items of lands continued to be orchards ever since the date of their conversion till the date of the application for exemption of the lands under section 73 (*vii*). This controversy need not however be gone into in great detail in this case on account of the fact that on another aspect of the matter, the petitioner's contentions clearly deserve to be accepted.

4. As I have already stated above, the second contention of the learned Additional Government Pleader is that the raising of plantain crops will not render the lands where such crops are raised orchards and that unless the said lands could be classified either as orchards, or topes or arecanut gardens, the respondents will not be entitled to claim the benefit of the exemption provided under section 73 (*vii*). In order to appreciate the contention of the learned Additional Government Pleader, it is necessary to make reference to the definition of an orchard occurring in section 3 (32) of the Act. The definition is as follows :

> " Orchard' means an enclosure or assemblage of fruit or nut-bearing trees, constituting the main crop therein, whether of spontaneous or artificial growth, but does not include trees on such bunds as are not within or adjunct to such enclosure or assemblage."

The question as to whether plantain is a tree or not arose for consideration in *Akshvanathaswami Devasthanam* v. *Ramaswami Reddiar*[1]. Ismail, J., after an elaborate consideration of the matter has held that plantain is not a tree and that botanically, as contained in the text books and encyclopaedias, and according to the meaning given in the various dictionaries a plantain is not a tree and that strictly speaking it is only a large herb and not a tree at all and is a tree, if at all, only in a loose sense. It is no doubt true that the case which arose for consideration in the above decision was one under the Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act (LVII of 1961). But that does not make any difference in the matter. The definition of ' orchard ' in the said Act is identically the same as that found in section 3 (32) of the Act concerned in this revision except for the small difference that in

1. (1971) 84 L.W. 335.

Act LVII of 1961, the additional words 'and includes nandavanams' find place in the definition of "orchard". The decision of Ismail, J., has been followed by Sadasivam, J., in *Govindasami Padayachi* v. *Suryanarayanaswami*[1] which was also a case under Act LVII of 1961. Sadasivam, J., has held that plantains are not trees and hence the exemption under section 51 (*iv*) of that Act could not be invoked on the ground that the land under cultivation of plantains will constitute orchards. He has further held that on the same reasoning it is not possible to hold that lands in which plantain crops are raised are topes.

5. I am in respectful agreement with the view expressed in these two decisions *viz.*, that plantain is not a fruit-bearing tree as contemplated in section 3 (32) of the Act. Once it is held that plantain is not a fruit-bearing tree it necessarily follows that the enclosure wherein the crop is raised will not be an orchard and once it is not held to be an orchard, the respondents are not entitled to claim exemption from the provisions of the Act under the cover of section 73 (*vii*).

6. The Tribunal has not gone into this aspect of the matter. On the other hand it has taken it for granted that plants which yield plantain fruits are undoubtedly plantain trees and, on that wrong surmise, has upheld the contention of the respondents that the three survey numbers in respect of which exemption sought for from the provisions of the Act are orchards.

7. The revision therefore succeeds and is allowed. The order of the Tribunal will stand set aside and the order of the Authorised Officer will stand restored. There will be no order as to costs.

S.J. *Petition allowed.*

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1. (1971) 84 L.W. 369.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ramaswami, J.*

T. M. Pambayan Ambalam (dead) and others .. *Appellants**

v.

K. R. Veeranan Ambalam and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 41, *rules* 4 *and* 33—*Scope—Promissory note by two defendants—Endorsement—Suit on the note—Plea of signatures in endorsement being forged—Trial Court holding signatures genuine—Decree—Appeal by first defendant only—Lower Appellate Court holding signatures to be forgery—Dismissing suit in entirety—Validity—Limitation Act* (*IX of* 1908), *sections* 18, 19 *and* 20.

Rules 4 and 33 of Order 41, Civil Procedure Code relating to the power of the lower appellate Court in an appeal filed by one of the defendants alone are not mutually exclusive but they are complementary to each other. The power under rule 4 can be exercised only when the decree appealed from proceeds on a ground common to all the plaintiffs or all the defendants. Rule 33 is somewhat wider and applies not only in cases where the decree appealed from proceeds on any ground common to all but also in cases where the result of interference in favour of the appellant necessitates re-adjustment of the rights of the other parties. [*Para.* 2.]

In a suit on a promissory note executed by two defendants reliance was placed on an endorsement of payment as saving the suit from the bar of limitation. The trial Court found the signatures of the defendants in the endorsement to be genuine and decreed the suit. The first defendant alone appealed. Holding the signatures in the endorsement to be forged, the lower appellate Court dismissed the suit. On appeal to the High Court by the plaintiff,

Held : The lower appellate Court had no jurisdiction to go into the question of the genuineness of the signature of the second defendant in the appeal filed by the first defendant alone. Each of the defendants

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*S.A. No. 1129 of 1971. 18*th January*, 1974

was interested only in the defence that his signature was not genuine and not in the question whether the signature of the other was genuine or not. The finding that the signatures were a forgery did not necessitate grant of relief to the second defendant also, as the relief asked against the defendants was not alternative and no question of readjustment of the rights of parties would arise. [*Para.* 2.]

Under section 20 (2) of the Limitation Act, in the case of more than one promisor and when the acknowledgment is made by one of them, the decree could be made against the person who acknowledged alone and the suit need not be dismissed necessarily against all of them. In the instant case, the decree against the second defendant cannot be disturbed and the suit should not have been dismissed in its entirety. [*Para.* 2.]

Cases referred to :—

Thirumalachariar v. *Adimoola Karayalar*, 65 M.L.J. 15 : 37 L.W. 798 ; A.I.R. 1933 Mad. 529 : *Krishna Reddi* v. *Rami Reddi*, (1954) 2 M.L.J. 559 : I.L.R. (1954) Mad. 1126 : 67 L.W. 346 : A.I.R. 1954 Mad. 848 ; *Thayammal* v. *Muthukumaraswami*, 57 M.L.J. 588: 30 L.W. 677: A.I.R. 1929 Mad. 881 ; *C. K. Kunjadi* v. *Chinnavava*, (1940) 2 M.L.J. 326 : 52 L.W. 364 (2); A.I.R. 1941 Mad.110.

Appeal against the decree of the Court of the Second Additional Subordinate Judge, Madurai in Appeal Suit No. 143 of 1969, preferred against the Decree of the Court of the District Munsif of Melur in Original Suit No. 132 of 1965.

R. Gopalaswami Ayyangar and *M. Srinivasan*, for Appellant.

A. Varadarajan, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He filed the suit for recovery of a sum of Rs. 2,329-67 being the principal and interest due on a promissory note executed by the two defendants who are the respondents herein. The promissory note is dated, 4th May, 1959. The plaintiff relied on an endorsement of payment of a sum of Rs. 350 made on 27th April, 1962 and signed by the defendants as saving the suit from the bar of limitation. The first defendant filed a written statement which was adopted by the second defendant in which it was stated that the promissory note was executed as security in connection with certain lease of a coconut tope and it was not supported by consideration. It was also pleaded that the signature of the defendants in the endorsement, dated 27th April, 1962 was a forgery and that therefore, the suit is barred by limitation.

2. The trial Court rejecting the defence held that the suit promissory note was supported by consideration and that the signature of the defendants in the endorsement is that of the defendants and not a forgery. In that view he held that the suit is not barred by limitation and decreed the suit as prayed for. The first defendant alone preferred an appeal impleading the plaintiff and the second defendant as respondents in the appeal. The lower appellate Court held that the promissory note was supported by consideration but differing from the finding of the trial Court held that the signature of the first and second defendants on the endorsement, dated 27th April, 1962 was a forgery and that, therefore, that endorsement could not save the suit from the bar of limitation. In that view the lower appellate Court allowed the appeal and set aside the decree against the defendants and dismissed the suit. In this appeal the learned Counsel for the appellant sought to challenge the finding that the signature of the defendants was a forgery. But I am unable to permit him to challenge that finding as it was a finding on a question of fact and it could not be stated that it is not supported by any evidence or that the finding was perverse. The learned Counsel, therefore, proceeded on the assumption that the signature of the defendants in the endorsement was not the signature of the defendants. It was the contention of the learned Counsel that the lower appellate Court had no jurisdiction to go into the question of the genuineness of the signature of the second defendant in an appeal filed by the first defendant alone, though the second defendant was a party to the appeal. According to the learned Counsel the decree as against the second defendant could not be challenged in the appeal and that the decree against him had become final. He therefore

wanted to sustain the decree as against the second defendant at least. The powers of the lower appellate Court in an appeal filed by one of the defendants alone is to be found in Order 41, rule 4 and rule 33. Under rule 4 where there are more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the defendants, any one of the defendants may appeal from the whole decree and thereupon, the appellate Court may reverse or vary the decree in favour of all the defendants. A similar power is also contained in rule 33 which provides that the appellate Court shall have powers to pass any decree and make any order which ought to have been passed or made and to pass or to make such or further decree or order as the case may require and this power may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection. This power also could be exercised by the Court notwithstanding that the appeal is as to part only of the decree. These two rules are not mutually exclusive but they are complementary to each other. But it is seen from the provisions that the powers under rule 4 could be exercised only when the decree appealed from proceeds on any ground common to all the plaintiff or to all the defendants. Rule 33 is a little wider than rule 4 in the sense that it is not only in cases where the decree appealed from proceeds on any ground common to all but also in cases where the result of interference in favour of the appellant necessitates the readjustment of the rights of the other parties as given in the illustration to that rule itself. I may at this stage refer to a few of the decided cases where this principle was applied. In *Thirumalachariar* v. *Adimoola Karayalar*[1] the suit was for specific performance of an agreement to sell. The suit was filed against the legal representatives of the owner. The defence was that the agreement was not genuine. This being a common question in which all the defendants are interested and a finding on that will dispose of the entire suit it was held in that case that a finding on that question in an appeal filed by one of the defendants alone will enure for the other defendants as well. This is clearly a case which will come under either rule 4 or rule 33 as the suit was for specific performance of particular agreement, and if that agreement was found to be not genuine, the suit could not be decreed against any person. In *Krishna Reddi* v. *Rami Reddi*[1] a Division Bench of this Court, after referring to the wide and unlimited jurisdiction of the Courts to pass a decree against a party who has not preferred an appeal under rule 33, referred to the principles in accordance with which that jurisdiction will have to be exercised and formulated the principles as falling under three different categories. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties as set out in the illustration to rule 33. The second class of cases is where the question is one of settling mutual rights and obligations between the same parties and the third class of cases is where the relief claimed is single and indivisible but is claimed against a number of defendants. But they hastened to add that these three classes of cases cannot be taken to be exhaustive enumeration of the class of cases in which the Courts could interfere under Order 41, rule 33. It is not necessary, therefore, to refer to all the other decisions cited by the learned Counsel for the appellant which all deal with questions where a common point on a question of fact was involved. Coming to the case on hand, if the finding of the lower appellate Court on the question as to whether the promissory note was supported by consideration was that it was not supported by consideration, the learned Counsel for the appellant would concede that that would dispose of the suit itself and the benefit could be given to the second defendant who did not file an appeal. But according to the learned Counsel the question whether the endorsement was genuine or not is not such a common question. The signature of both the defendants may be true or both may not be genuine or either one of them may be genuine. Each of the defendants is interested only in the defence that his

1. 65 M.L.J. 15 : 37 L.W. 798: A.I.R. 1933 Mad. 529.

1. (1954) 2 M.L.J. 559 : I.L.R. 1954 Mad. 1126 : A.I.R. 1954 Mad. 848.

signature is not genuine and not in the question whether the signature of the other was genuine or not, because unless it is established that his signature is not genuine, he is not entitled to be relieved from the liability. Sections 18 and 19 of the Limitation Act of 1963 deal with the effect of acknowledgement and effect of payment on account of a debt. An acknowledgment in writing signed by the party against whom the right is claimed gives a fresh period of limitation from the time when the acknowledgment was so signed under section 18. If payment on account of a debt appears in the handwriting of the person making the payment such payment also would give a fresh period of limitation under section 19. But these two provisions are subject to clause (2) of section 20 which provides that where there are more than one executant the written acknowledgment should be signed by everyone of them and the period of limitation could not be extended against a person who had not signed except in cases where the person who signed proves that the payment or the acknowledgment was made by him as an agent for all the executants. But in the case of more than one promisor and when the acknowledgment was made only by one of them, the decree could be made against the person who acknowledged alone and the suit need not necessarily be dismissed as against all. This has been so held in *Thayammal* v. *Muthukumaraswami*[1]. That was a case where a mortgage was executed by three persons. There was an endorsement of payment by only two of the mortgagors. In an appeal filed by the mortgagors against the decree obtained by the mortgagee this Court found that the endorsement was made only by two of the defendants and that will not save the bar of limitation as against the mortgagor who did not sign the endorsement. The decree of the lower Court was, therefore, set aside in so far as the mortgagor who did not sign the endorsement but confirmed as against the mortgagors who signed the endorsement. This decision was followed by this Court in *C. K. Kunjandi* v. *Chinnavava*[2]. Therefore, in this case if the signature of the second defendant was found to be genuine, a decree could have been made against the second defendant alone though the suit against the first defendant is dismissed. The second defendant alone is interested in establishing that his signature is not genuine in order to relieve himself of his liability. The finding of the lower appellate Court that the signature of the first defendant is not genuine also does not necessitate the grant of relief to the second defendant as the relief asked for against them is not alternative, and no question of readjustment of the rights of parties also would arise. In fact, it was not necessary for the lower appellate Court to go into the genuineness of the signature of the second defendant in order to give any relief to the first defendant who was the appellant. The lower appellate Court, therefore, erred in going into that question and dismissing the suit in its entirety. The second defendant had also not appeared in this case or before the lower appellate Court. He also did not examine himself as a witness in the trial Court. The question whether there was a proper or justifiable excuse for the second defendant for not filing an appeal and asking for relief in the appeal filed by the first defendant does not therefore, arise.

3. The second appeal is, therefore, allowed in part and the judgment and decree of the lower appellate Court in so far as it sets aside the decree as against the second defendant is set aside and the suit is decreed as against the second defendant alone and dismissed as against the first defendant. The first defendant will be entitled to his costs in this second appeal. No leave.

P.S.P. ——— *Appeal allowed.*

1. 57 M.L.J. 588 : A.I.R. 1929 Mad. 881.
2. (1940) 2 M.L.J. 326 : A.I.R. 1941 Mad. 110.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*T. Ramaprasada Rao, J.*

His Holiness Sri Vanamamalai, Ramanuja Jeer Swamigal, Head of the Vanamamalai Mutt, Nanguneri, through his Authorised Agent, S. R. Srinivasan .. *Petitioner**

v.

The Commissioner, The Hindu Religious and Charitable Endowments, Madras-34 .. *Respondent.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), section 92—Mutt—Religious Institution—Levy of contribution—Percentage basis—Levy by the Endowment Board—Whether valid.

The Act XXII of 1959 enabled the Religious and Charitable Endowments Board to levy contribution not exceeding seven per cent. of the income of the Mutt as may be prescribed in respect of the services rendered by the Government and their officers and for defraying the expenses incurred on account of such services. Rules had been framed and the rules enumerated the rates at which such contributions could be collected from all religious institutions, including Mutts. One of the Mutts challenged the levy of contribution on the basis of a named percentage relative to the income of the Mutt as an arbitrary scale appointed by the rule-making authority and hence the rules governing the situation were *ultra vires.*

Held,

So long as the object of the levy was borne in mind and the fund collected for the purpose was to a considerable extent utilised for purposes of achieving the object, then, there was considerable nexus between the object and the levy. If such a nexus was proved by facts, then the rule, which enabled the department to levy varied percentage of fee with reference to the income of the mutt or institution, could not *prima facie* be held to be *ultra vires* of the rule making authority. The yard-stick used should not be adjudged literally and out of context of relevant events. The contention that the percentage of levy was arbitrary and the concerned rule sanctioning such levy was *ultra vires,* was not sustainable. [*Para.* 9.]

Cases referred to :—

H. H. Sudhindra Thirtha Swamiar v. *Commissioner for Hindu Religious and Charitable Endowments, Mysore,* (1963) 2 S.C.R. (Supp.) 302 ; A.I.R. 1963 S.C. 966 ; *Commissioner of Hindu Religious and Charitable Endowment, Mysore* v. *U. Krishna Rao,* (1970) 2 S.C.J. 393 ; A.I.R. 1970 S.C. 1114; *The Delhi Cloth and General Mills Company, Limited* v. *The Chief Commissioner, Delhi,* (1971) 2 S.C.J. 40 : A.I.R. 1971 S.C. 344 ; *H. H. Sudhindra Thirtha Swamiar* v. *Commissioner of Hindu Religious and Charitable Endowments, Madras,* (1956) 1 M.L.J. 532 : 69 L.W., 337 : A.I.R. 1956 Mad. 491.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent to forbear from levying any contribution or audit fees under section 92 of the Hindu Religious and Charitable Endowments Act XXII of 1959 or to take any coercive possesses in respect of the same under section 94 of the said Act.

T. Rangaswami Iyengar, for Petitioner.

T. Sathiadev, Assistant Government Pleader on behalf of Respondent.

The Court made the following

ORDER.—His Holiness Sri Vanamamalai Ramanuja Jeer Swamigal, Head of Sri Vanamamalai Mutt, Nanguneri, Tirunelveli District, is the petitioner. Sri Vanamamalai Mutt is a well-known religious institution. The Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), hereinafter referred to as the Act, enables the Religious and Charitable Endowments Department, hereinafter called the Department, to levy contribution not exceeding seven per cent of the income of the Mutt as may be prescribed in respect of the services rendered by the Government and their officers and for defraying the expenses incurred

*W.P. No. 3203 of 1970. 30*th January,* 1974.

on account of such services. Rules have been framed in G.O. No. 4920, Revenue, dated 30th November, 1960; and these rules are called the "Assessment, Levy and Recovery of Contribution, Costs Rules". Section 93 provides that notwithstanding anything contained in sub-section (1) of section 102, all costs, charges and expenses incurred by the Department as a party, to or in connection with, any legal proceeding in respect of any religious institution shall be payable out of the funds of such institution, except in cases where a liability to pay the same has been laid on any party or other person personally and the right to reimbursement under this section has been negatived in express terms. The rules enumerate the rates at which such contributions could be collected from all religious institutions, including mutts. Under the Rules, it is obligatory on the part of the body in management and control of the institution to submit to the Commissioner of Endowments annually a statement showing the receipts and charges relating to the fasli year in question as also the expenditure etc., incurred, as set forth in rule 4. If there is a failure in the matter of the submission of such statements, the commissioner may assess the income of such institution to the best of his judgment and the amount so assessed shall be deemed to be the income of the institution concerned within the meaning of section 92 (1) of the Act. A provision is also made in rule 9 to bring to assessment if there is an escapement of it. The period within which such escapement should be brought to book is fixed as five years. Section 94, while stating that the assessment of such contribution, costs, charges and expenses payable under sections 92 and 93 shall be assessed on and notified to the trustee of the institution concerned in the prescribed manner, also enumerates the modes by which such amounts so assessed could be recovered. If there is a failure on the part of the person concerned, or the institution concerned to pay the amount as assessed, such amount shall be recovered as if it were an arrear of land revenue by invoking the jurisdiction of the Collector of the district and by setting in motion the provisions of sub-sections (3) to (8) of section 94. It is common grounds that for Sri Vanamamalai Mutt such levies for contribution were made for faslis 1374, 1375 and 1376. The petitioner, on a demand made for the purpose for such contribution for fasli 1374, objected by this petition dated 10th February, 1966 to the quantum of assessment. This objection was considered by the Commissioner and was rejected as the assessment was arrived at on the basis of the income derived during fasli 1373. As regards faslis 1375 and 1376, it is also common ground that when demands were raised for the respective faslis the petitioner did not prefer any objection as is contemplated in the Act and the Rules as above. But on 26th November, 1968, the petitioner objected to the demand of contribution and audit fee for faslis 1374, 1375 and 1376 and sought for a re-hearing and for a further scrutiny of the Mutt's accounts. The petitioner was informed that in so far as his objection for faslis 1374 was concerned it has become final and in respect of the demands for faslis 1375 and 1376 no objection having been preferred within the time prescribed, the assessments for the relative faslis have become final. The petitioner's further case is that the costs included in the challenged demand is not recoverable in law, while the case of the Department is that it is recoverable under the provisions of law. The Department's further case is that the challenged demand was raised after giving credit to the amounts paid by the Mutt and it also expressed in writing that it is willing to revise the demand if any further payments have been made and that the Tahsildar, who is the officer through whom the collection of contribution, audit fee, costs, etc., could be made as if it were an arrear of land revenue, will be informed accordingly.

2. In the counter-affidavit details are given as regards the quantum of demand made and the moneys paid by the Mutt, as also the details of expenditure incurred by the Department towards costs in Appeal No. 439 of 1961 on the file of this Court, towards which also recovery proceedings have been initiated. In a supplemental counter-affidavit factually the Department justifies the percentage of the levy as prescribed under the Rules and would say that such contributions from religious institutions which were

made from the inception and constitution of the Hindu Religious Endowments Boards in the year 1926 are not so disproportionate to the value of the services rendered by the department to the religious institutions as a whole. Therefore, the reasonableness of the fee so collected is also justified.

3. Mr. Rangaswami Iyengar for the writ petitioner would contend that as Mutts are treated on a par different from religious institutions as is seen from sections 12, 21, 29, 44 and 59 of the Act, the general treatment accorded to other institutions ought not to be applied to Mutts as well and in that sense the contribution demanded under sections 92 to 94 of the Act is not a fee and that the resultant process for collecting it is illegal. The second contention is that the levy of contribution on the basis of a named percentage relative to the income of a Mutt is an arbitrary scale appointed by the rule-making authority and hence the rules governing the situation are *ultra vires*. The next contention is that there is abundant available surplus in the fund in question and that itself is an indicia that the total fee collected under the head of 'contribution' is disproportionate to the cost of the services rendered by the Department towards all institutions including Mutts. It is also urged that the costs incurred by the Department in any litigation connected with a Mutt is also terminologically characterised as contribution and is recoverable under section 93 of the Act as if it was contribution and the machinery to collect contribution can also be moved for collecting it as the costs incurred by the Department. In this sense it is said that this is in conflict with the generality of the provisions in the Code of Civil Procedure as in the Act of Parliament costs follow only the event and are not awarded as a matter of course. This conflict, therefore, when noticed, makes the provision for recovery of costs an unenforceable one. Lastly, it is said that there was no adequate opportunity to the Mutt to place all the relevant material before the authorities and establish that the quantum claimed is far excessive.

4. The learned Government Pleader, on the other hand, placed considerable reliance upon the decisions of the Supreme Court in *H. H. Sudhindra Thirtha Swamiar* v. *Commissioner of Hindu Religious and Charitable Endowments, Mysore*[1], *Commissioner of Hindu Religious and Charitable Endowments, Mysore* v. *U. Krishna Rao*[2], and *The Delhi Cloth and General Mills Company Ltd.* v. *The Chief Commissioner, Delhi*[3] besides referring to the Dvision Bench decision of our Court in *Shri H.H. Sudhindra Thirtha Swamiar* v. *Commissioner of Hindu Religious and Charitable Endowments, Madras*[4] and says that the contribution claimed by the statutory authorities in the instant case is a fee notwithstanding the fact that there is an element of compulsion in it. Regarding the submission that there is a conspicuous surplus in the fund it is said that with reference to statistics it is seen that over 46 years only a surplus of about 65 lakhs odd is available, meaning thereby that on the average there was only a surplus of about 1½ lakhs per year. If once it is established that a major portion of the contribution collected is utilised for services rendered and towards audit fees, the observations of the Supreme Court in *The Delhi Cloth and General Mills Company Ltd.* v. *The Chief Commissioner, Delhi*[3], would govern if it has a nexus to the object for which the collection is made. On the question whether the entitlement of the Department to collect costs is violative of the common law of the country, it is said that in the instant case costs have been incurred by the Department when it initiated proceedings for framing a scheme for the Mutt in question, which is certainly a proceeding which was intended for the benefit of the institution. In that sense section 93 of the Act which enables the Department to collect such costs is not in any way in conflict with any of the relevant provisions in the Code of Civil Procedure. Lastly it is said that the petitioner was given adequate opportunity to make his representations and he did not avail himself of the same. He cannot seek for such an opportunity once again at this stage. The rules framed are mandatory and the petitioner cannot have a grievance if he has not availed of the real pur-

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1. (1963) 2 S.C.R. (Supp.) 302 : A.I.R. 1963 S.C. 966.
2. (1970) 2 S.C.J. 393 : A.I.R. 1970 S.C. 1114.
3. (1971) 2 S.C.J. 40 : A.I.R. 1971 S.C. 344.
4. (1956) 1 M.L.J. 532 : 69 L.W. 337 : A.I.R. 1956 Mad. 491.

port of such rules by objecting to the demand in time.

5. No doubt, there are separate provisions in the Act which deal with mutts as such. But, as a "religious institution" means a math, temple, or specific endowment within the meaning of section 6 (18) of the Act, it is unnecessary to consider the specific provisions made in the Act in relation to Mutts as they are not necessary for purposes of this case. The question whether contributions levied on religious institutions, including Mutts, is in the nature of a tax or fee, need not at all detain us for the reason that the very question came up earlier before this Court and the Supereme Court. Claims towards audit fees in lieu of services rendered by the Department are not a tax but a fee. In *Shri H.H. Sudhindra Thirtha Swamiar* v. *Commissioner of Hindu Religious and Charitable Endowments, Madras*[1], section 76 (1) of Act XIX of 1951 which is equivalent to section 92 of the present Act, has been held to be *intra vires* as what it purports to levy is only a fee and not a tax. But Mr. Rangaswami Iyengar wants to take advantage of certain observations made by Rajagopalan, J., in that case, which is to the effect that the rate of fee chargeable under the relevant sections in the Act should be reduced to maintain a just relation between fee levied and the services rendered though an arithmetical precision is neither possible nor necessary. It is in this context the unreasonableness of the percentage of the levy is pressed into service. I shall refer to it sometime later.

6. Again in *H.H. Sudhindra Thirtha Swamiar* v. *Commissioner for Hindu Religious and Charitable Endowments, Mysore*[2], the Supreme Court held :

> " The annual contributions levied under the amended section 76 (1) of Act (XIX of 1951) go into a separate fund and not the consolidated fund of the State and are earmarked for defraying the expenses for rendering services: they are not even payable to the Government but are payable to the Commissioner and they are levied not as a tax but only as fee. A fee does not cease to be of that character merely because there is an element of compulsion in it, nor is it a postulate of a fee that it must have direct relation to the actual service rendered. Absence of uniformity is not a criterion on which alone it can be said that the levy is of the nature of a tax. The Legislature has power to enact appropriate retrospective legislation declaring these levies as fees by denuding them of the characteristics of tax. "

1. (1956) 1 M.L.J. 532 : 69 L.W. 337.
2. (1963) 2 S.C. R. (Supp.) 302: A.I.R. 1963 S.C. 966.

In *Commissioner of Hindu Religious and Charitable Endowments, Mysore* v. *U. Krishna Rao*[1], the general rules prescribing the levy of fee in the earlier Act were held to be sufficient and in that context the Supreme Court said :

> " Under the Act a fee though levied for rendering services of a particular type is not to be correlated to the services performed for each individual who is intended to obtain the benefit of the services. The correlation must be between the expenses incurred by the authority levying the fee for generally providing the service and the aggregate of the levy from persons who are to be made subject thereto. It is a necessary corollary that under the Act general rules prescribing the levy of fee from religious endowments have to be made, and not rules governing individual endowments. If services are provided, assuming that a particular institution either does not need the services, or does not obtain the benefit of the services, the contribution would still be recoverable."

The above principle is reiterated by the Supreme Court, though in a different context, in *The Delhi Cloth and General Mills Company Limited* v. *The Chief Commissioner, Delhi*[2]. This case arose under the Factories Act. While considering the provisions of the Factories Act and the Delhi Factories Rules which prescribed the rate of such levy the Supreme Court said :

> " A levy in the nature of a fee does not cease to be of that character merely be-

1. (1970) 2 S.C.J. 393 : A.I.R. 1970 S.C. 1114.
2. (1971) 2 S.C.J. 40 : A.I.R. 1971 S.C. 344.

cause there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to individual who obtains the benefit of service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax."

8. There is, therefore, ample authority for the proposition that the contribution and audit fee demanded by the Department is legal and is sustainable in the eye of law as it is not a tax. The only test it should satisfy is that under the garb of collecting a fee, the Department should not collect exorbitant amounts which are absolutely unrelated or disproportionate to the services rendered by it to the relative institution as a whole. As already stated, it is not the service to a particular Mutt or institution that comes into judicial verdict for purposes of weighing the reasonableness or otherwise of such a fee. So long as the amounts collected by way of contribution, audit fee, costs, etc., are all pooled up in a particular fund which is to be utilised for purposes of rendering service to all the religious institutions in the State without any discrimination whatsoever then the only question is whether the totality of the collections made through a period gives the impression that it was only for aggrandizing the fund as such and such amounts so collected are so disproportionate to the nature, quality and character of services rendered to the institution.

9. It is in this context the second contention of the learned Counsel has to be considered. Mr. Rangaswami Iyengar would say that a uniform percentage on the basis of the income of the Mutt would lead to hardship and the hardship, if so unreasonable with the situation, projects an illegality. Further, it is said that the observations of the Division Bench of this Court in *Shri H.H. Sudhindra Thirtha Swamiar* v. *Commissioner of Hindu Religious and Charitable Endowments, Madras*[1], would support his contention. No doubt, if unreasonableness is writ large on the face of the levy our Court has expressed the opinion that it would be unreasonable to uphold the same. We have already noticed that a separate fund has been created by the Department in which it pooled all the levies and fees collected from the various religious institutions and Mutts. From this repository moneys are expended towards religious causes and for the improvement of the various institutions in the State of Tamil Nadu. The statistics furnished by the Department in the counter-affidavit establishes that for over 46 years, there has been an accumulated surplus of about Rs. 65,00,000 which means that for the entire State, there was an average available surplus of rupees one and a half lakhs in the Commissioner's fund. This aspect taken in juxtaposition to the amounts expended year after year towards the betterment of the religious institutions and the Mutts, which is well over 60 per cent of the collections made, establishes that there is a "just relation" between the fee levied and the services rendered. Rajagopalan, J., in the Madras case also conceded the proposition that an arithmetical position is neither possible nor necessary in the matter of the understanding of the "just relation" between the fee levied and the services rendered. There is enough material before me as is seen from the counter-affidavits filed by the Government to come to the reasonable conclusion that though the percentage has an impact on the income of a Mutt or an institution, it cannot be objectively badged as an arbitrary levy and in that behalf the rule framed for the purpose has to be struck down as being *ultra vires*. The rules framed under sections 92and94 of the Act under G.O. Ms. No. 4920, Rev., dated 30th November, 1960 no doubt fixes a percentage of levy on the basis of the annual income of the religious institutions. It is not the pattern of assessment that has to be mainly considered to find out whether the levy is reasonable or not, the entire process and the resultant achievement should enter into the computation and it has to be

1. (1956) 1 M.L.J. 532 : 69 L.W. 337.

adjudged later whether the resultant of the process has any nexus to the object with which this levy or assessment is imposed under the Act. From the hypothesis furnished, it cannot be said that the contribution is out of all proportion to the services rendered by the Department. In fact in the *The Delhi Cloth and General Mills Company Limited* v. *The Chief Commissioner, Delhi*[1], which has already been referred to it has been held that if 60 per cent of a fund is utilised for the purpose for which it is created, then, it cannot be said to be wholly unrelated to the object of the levy. Following this and from the analytical data furnished by the Department regarding the collections and the expenses towards the services rendered, the levy, though based on a percentage of the income of a Mutt or the institution cannot be said to be unreasonable. So long as the object of the levy is borne in mind and the fund collected for the purpose is to a considerable extent utilised for purposes of achieving the object, then, there is considerable nexus between the object and the levy. If such a nexus is proved by facts, then the rule, which enables the Department to levy varied percentage of fee with reference to the income of the Mutt or institution, cannot *prima facie* be held to be *ultra vires* of the rule-making authority. As I said already, the yardstick used should not be adjudged literally and out of context of relevant events. I am, therefore, of the view that the second contention of Mr. Rangaswami Iyengar that the percentage of levy is arbitrary and the concerned rule sanctioning such levy is *ultra vires*, is not sustainable.

10. The next contention is akin to the second contention. A reference is made to the available surplus as on date in the fund in question and it is argued that that by itself is sufficient to show that the contributions are disproportionate to the costs and the services rendered by the department. Here again there is fallacy. The surplus shown has been accumulated for a period of three decades and more. The avearge available surplus is about rupees one and a half lakhs. On the average more than 60 per cent of the collections are spent towards the general improvement of the funds and the Mutts. There is also a scheme in contemplation by the Department, for the diversion of the available surplus; for utilisation for the purposes mentioned in section 66 of the Act, for contribution to the Poombuhar College of Indian Culture and the Parasakthi College for Women at Courtallam, which are run under thd auspices of the Department, for the renovation of the Auvudaiyar Koil in Thanjavur, which is a renowned temple, for inter-State apportionment of the surplus funds consequent on the re-organisation, for improvement of the properties of the temple for augmenting the income etc. Thus, it cannot be said that the available surplus, though considerable, is because of non-rendering of the necessary services by the Department to the institutions in general. I am unable to agree with Mr. Rangaswami Iyengar that the statistics, which reflect the surplus in the fund, is by itself an indication to show that the contributions collected over a number of years is disproportionate to the costs incurred by the Department in rendering the services.

11. The next contention is that the provision for recovery of costs in this State enactment would conflict with the rational provision in the Code of Civil Procedure in which costs ordinarily follow the event. Here again, the learned Counsel has ignored the parenthesis in section 93 which provides that in cases where a liability to pay the costs and expenses has been laid on any party or other person personally and the right to reimbursement under this section has been negatived in express terms, section 93 would have no application. In normal cases where costs and expenses have been incurred by the Department in connection with any legal proceeding in respect of a religious institution, such costs and expenses shall be payable out of the funds of the institution. Under section 94 such costs recoverable under section 93 is placed on a par with contribution recoverable under section 92 and the process of recovery is made the same for both. It is, therefore, fallacious to contend that there is a conflict between the Act as a local Act and the Code of Civil Procedure as an act of Parliament in the matter of the recovery of costs and expenses. There is a special provision in

1. (1971) 2 S.C.J. 40 : A.I.R. 1971 S.C. 344.

the Act for the reimbursement of such costs and expenses by the Department and that too by the authority of statute law. There is nothing illegal or surprising about this. As a matter of fact, the costs in the instant case have been incurred, when the department filed a civil proceeding for framing a scheme for the Vanamamalai Mutt. It is only to reimburse themselves with the costs and expenses incurred therefor that a demand has been raised which is not only permissible under the specific statute but which should also be held to be an equitable provision since the Mutt in question had the benefit of such a civil proceeding. Having regard to the pronouncement of the Supreme Court already referred to, I am unable to hold that the fee levied in the instant case is an unreasonable one and has the badge of arbitrariness in it and that the costs and expenses which are also the subject-matter of the impugned demand, cannot be added on and included in it.

12. The last contention of the Counsel for the petitioner is that there was no adequate opportunity to the Mutt to establish its case by making representations against the demand. This appears to be factually incorrect. For Fasli 1374 when a demand was made, the petitioner did file its objections which were considered by the Commissioner and rejected by him. The demand for contribution and audit fees for Fasli 1374 has thus become final and conclusive. As regards Fasli 1375 and 1376, the Mutt did not prefer any objections at all. Therefore, the Department cannot be blamed, if they invoked rule 6 of the rules which enables the Commissioner to assess the income of the institution to the best of his judgment and thereafter impose the levy as above in accordance with the Act and the rules framed thereunder. I am unable to agree with the learned Counsel for the petitioner that no full opportunity was given to the petitioner to oppose the levy by placing the necessary material before the Commissioner. The petitioner cannot take advantage of his own laches. The petitioner did not object in time. The rules prescribed a time. After the expiry of the prescribed period, the Commissioner, has no option except to assess the income by the best judgment method. This he did for Faslis 1375 and 1376. The petitioner, therefore, cannot complain that in the instant case, the principles of natural justice have been violated.

13. As I am unable to agree with the contentions of the learned Counsel for the petitioner and as the relief asked for is one to direct the respondent to forbear from levying any contribution or audit fees under section 92 of the Act or to take coercive process in respect of the same, I am unable to grant the same. There has not been any violation of any public duty on the part of the respondent when it levied the fee in accordance with the Act and in accord with the prescribed scale and also when it invoked section 94 of the Act in default of payment of the demanded amount.

14. The writ petition, therefore, fails and the same is dismissed, but in the peculiar circumstances, there will be no order as to costs.

S.J. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Maharajan, J.*

Perumal and others .. *Appellants**

v.

K. Jayammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 99—Suit to enforce mortgage—Preliminary mortgage decree—Amendment ordered by trial Court—Not properly carried out in the decree—Duty of executing Court—Can construe decree with reference to the order passed by the trial Court—No jurisdiction to go into the form of the decree granted by trial Court.

In spite of the omission of the office to carry out properly the amendment ordered by the trial Court, the executing Court can construe the provisions of the decree with reference not only to the irregularly drafted decree but also to the order passed by the Court in the interlocutory application. [*Para.* 2.]

The Court should look rather to the substantial effect intended by the decree

*A.A.A.O. No. 123 of 1971. *6th February*, 1974

than to the precise form of words which the Court had used. Law does not favour frivolous objections in regard to the form of the decree. [*Para.* 3.]

A decree as amended must show on what judgment it was based, for and against whom it was issued and the amount to be taken from the latter for the benefit of the former. If, therefore, that decree specified the precise amount which had to be recovered and it directed that the recovery should be made by the sale of the mortgaged property, the executing Court had no option but to execute the decree. It had no jurisdiction to go into the question whether the form of the decree granted by the trial Court was substantially in accordance with the procedure prescribed by the Code of Civil Procedure. [*Para.* 3.]

Cases referred to :

Chhaganlal Sakarlal v. *Jayaram Deoraj*, (1927) I.L.R. 51 Bom. 125 ; *Jawahir Mal* v. *Kistur Chand*, (1891) I.L.R. 13 All. 343 ; *S. P. Majoo* v. *Ganga Dhar*, (1969) 2 S.C.J. 93 : A.I.R. 1969 S.C. 600 ; *Platt* v. *Mendel*, (1884) 27 Ch.D. 246 ; *Mahadev Parshad* v. *Mungi*, A.I.R. 1959 Punj. 565 ; *Venkata Reddayya* v. *Kondaia Rao*, (1952) 2 M.L.J. 665 : A.I.R. 1953 Mad. 1007 ; *Vedavyasa Ayyar* v. *Madura Hindu Sabha Nidhi Company, Limited*, (1919) I.L.R. 42 Mad. 90 : 35 M.L.J. 639 ; *Hira Lal* v. *Kali Nath*, (1961) 2 S.C.J. 592 : (1961) 2 M.L.J. (S.C.) 157 : (1961) 2 An.W.R. (S.C.) 157 : (1962) 2 S.C.R. 747 : A.I.R. 1962 S.C. 199.

Appeal against the order of the District Court, Chingleput, dated 13th August, 1971 and made in C.M.A. No. 23 of 1970 (E.P. No. 279 of 1969 in O.S. No. 328 of 1963 District Munsif's Court Chingleput).

T. Rangaswami Ayyangar and *K. Srinivasan*, for Appellant.

T. V. Balakrishnan, for Respondents.

The Court delivered the following

JUDGMENT.—This is a civil miscellaneous second appeal against the judgment of the District Judge of Chingleput allowing C.M.A. No. 23 of 1970 against the order of the District Munsif of Chingleput in execution petition No. 279 of 1969 in O.S. No. 328 of 1963. In order to appreciate the controversy between the parties it is necessary to state a few facts. The Chingleput Dhanasekara Nidhi Limited, instituted a suit, O.S. No. 328 of 1963 on the file of the District Munsif's Court, Chingleput in enforcement of a mortgage, granted by the first defendant in favour of the Nidhi. Defendants 2 to 7 were impleaded as subsequent purchasers of the hypotheca. The 8th defendant was impleaded as she had obtained a subsequent mortgage of the same property from the first defendant on 11th June, 1962. This mortgage, though subsequent to the mortgage granted in favour of the first defendant, was antecedent in point of time to the alienations in favour of the defendants 2 to 7. The 8th defendant, who is a woman, prayed in her written statement for a decree in her favour for the amount due under her mortgage. A preliminary decree was granted in favour of the plaintiff and that decree entitled the 8th defendant to work out her equities. Subsequently, as the 8th defendant was aggrieved with this decree, she filed I.A. No. 68 of 1963 under section 152, Civil Procedure Code, for amendment of the decree by incorporating the following clause *viz.*, "granting the usual mortgage decree on the mortgage deed in favour of the petitioner (D-8) similar to the one that was granted in favour of the plaintiff and enabling the petitioner to realise the amount due under her mortgage by sale of the hypothecated properties". Notice of this application was admittedly served upon the mortgagor and after hot contest, the Court overruled the objections raised by him and granted on 3rd March, 1965 an amendment of the decree as prayed for without costs. Unfortunately, a perusal of the revised decree shows that the amendment was not properly carried out. A final decree was passed on 24th April, 1967 providing that after the plaintiff's decree was fully satisfied, the 8th defendant would be entitled to realise the mortgage amount due to her from out of the surplus sale proceeds in the event of the hypotheca being sold. It appears that there was a settlement out of Court between the mortgagor and the earlier mortgagee, the plaintiff, with the result, the plaintiff entered full satisfaction of the decree on 7th May, 1969. Evidently, this step was

taken behind the back of the 8th defendant to frustrate her claim. Subsequently, the 8th defendant filed E.P. No. 279 of 1969 praying for the sale of the hypotheca so that she might realise the amount due to her from the sale proceeds. The mortgagor and the subsequent alienees contended that the 8th defendant was not competent to execute the decree after satisfaction had been recorded of the decree in favour of the plaintiff. The District Munsif held that as the hypotheca had not been sold in execution of the decree in favour of the prior mortgagees and as the decree itself had been satisfied without a sale, it was not competent for the 8th defendant to execute the decree which stood discharged. Consequently, the learned District Munsif dismissed her execution petition and referred her to a separate suit on the puisne mortgage. The puisne mortgagee preferred an appeal to the District Court, Chingleput and the learned District Judge has allowed the appeal, and directed the District Munsif to restore the E.P. No. 279 of 1969 and proceed with execution. It is against this order, defendants 2, 4 to 7 have preferred this appeal.

2. I have little hesitation in agreeing with the learned District Judge and confirming his judgment. A number of technical objections have been raised by the appellants against the executability of the final decree. It is true that the final decree does not correctly incorporate the amendment directed by the Court in I.A. No. 68 of 1963. All that the revised decree says is that the money realised by 'such sale' shall be paid into Court and be duly applied, after deduction therefrom of the expenses of the sale, first in payment of the amount paid by the 8th defendant in respect of the plaintiff's mortgage and the costs of the suit in connection therewith and in payment of the amount, which the Court may adjudge due in respect of subsequent interest on the said amount. This clause in the decree seems to contemplate a case where the 8th defendant pays off the prior mortgage, in which case only she would be entitled to bring the hypotheca to sale. But the effect of the amendment ordered by the Court in I.A. No. 68 of 1963 was to grant the "usual" mortgage decree on foot of the mortgage deed in favour of the petitioner (D-8) similar to that which was granted in favour of the plaintiff and to enable the petitioner independently to realise the amount due under her mortgage by sale of the hypothecated properties. The executing Court should while construing the decree read it in conjunction with the order passed in I.A. No. 68 of 1963. It may be that by a clerical mistake committed by the office of the District Munsif the amendment directed by the Court was not carried out. But, the person who had obtained the relief, ought not to suffer for the mistakes of the office. In fact, in *Chhaganlal Sakarlal* v. *Jayaram Deoraj*[1] the plaintiff who had obtained a preliminary decree asked for execution of the decree without getting a final decree. No formal final decree was drawn up at all in that case. A Division Bench of the Bombay High Court, considering the objection that technically there was no final decree which could be executed, observed as follows: "This contention has become possible, because of the laxity which prevails in the lower Courts in drawing up decrees in mortgage suits. In the present case the preliminary decree was drawn up in the proper form provided by the Code of Civil Procedure. Under rule 5 of Order 34, when such payment as is directed by the preliminary decree is not made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold ...... The question that now arises is whether, at this distance of time, nearly fifteen years after the decree, and twelve years after the order making the decree absolute was made, the execution can go on or not. Having regard to the terms of the preliminary decree which has been made absolute, we could only attribute the omission to have a final decree drawn up to a misapprehension on the part of the Court, as well as the parties concerned as to the necessity of having a final decree formally drawn up. The parties seem to have gone on all these years on the footing that the preliminary decree, which was made absolute, was the formal expression of the final decree under rule 5

1. (1927) I.L.R. 51 Bom. 125.

of Order 34. I am of opinion that, though the final decree has not been formally drawn up on the terms of the preliminary decree, which has been made absolute, that decree coupled with the order, may be taken under the circumstances to be the final decree. In its ultimate analysis it is only a formal defect. It is conceivable that a formal defect of this nature may lead to a real difficulty in the way of execution and it is necessary to see that even such a formal defect does not creep in, and that a formal decree is drawn up when the decree is made final. But under the circumstances of this case, we are not prepared to hold that there is no executable decree. The result of allowing a contention of this nature at this distance of time, will be that a decree will have to be drawn up formally now and a fresh beginning will have to be made in the way of execution after the lapse of so many years. That is a result which should be avoided so far as it is legally possible to do so ". In that case their Lordships relied upon *Jawahar Mal* v. *Kistur Chand*[1], where there appears to have been an omission of this kind and it was held that such an omission may be condoned where the terms of the decree sought to be executed are otherwise ascertained or are clearly ascertainable, as they are in this case. Section 99 of the Code of Civil Procedure provides that "No decree shall be reversed or substantially varied, nor shall in any case be remanded, in appeal on account of any mis-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court." The salutary principle embodied in section 99, Civil Procedure Code, has been followed in both the cases cited *supra* Following these rulings I think it right that in spite of the omission of the office to carry out properly the amendment ordered by the trial Court, it was open to the executing Court to construe the provisions of the decree with reference not only to the irregularly drafted decree but also to the order passed by the Court in I.A. No. 68 of 1963.

1. (1891) I.L.R. 13 All. 343.

3. It is next contended on behalf of the appellants that it was incompetent for the Court in an action filed by an earlier mortgagee to grant a decree in favour of a puisne mortgagee. I am unable to accept this contention. It is true that an irregularity has been committed by the trial Court when it granted the amendment as prayed for. As explained by the Supreme Court in *S. P. Majoo* v. *Ganga Dhar*[1], there was a recognised practice on the original side of some High Courts to treat the preliminary mortgage decree as being in favour of not only the first mortgagee but also in favour of the second mortgagee and this practice of treating the suit as one for the benefit of the puisne mortgagee was based on the English practice as it appears from the case of *Platt* v. *Mendel*[2]. Their Lordships pointed out, that under the Transfer of Property Act, the proper procedure is different and the effect of incorporation of the relevant sections in the Transfer of Property Act under Order 34 of the new Code of Civil Procedure, was to put an end to any independent practice on the original side of the Calcutta High Court based on the old procedure. Their Lordships held that " The legal position therefore is that the second mortgagee is merely made a party to the suit in order that he might have an opportunity of redeeming if he wished, and in order that he might receive his mortgage money, or part of it, out of the surplus sale-proceeds after satisfaction of the first mortgagee, but the decree was not really a decree in his favour, and he could not insist upon a sale nor get a personal decree in his favour if the first mortgagee was satisfied by the mortgagor before the sale". All that transpires from these observations of the Supreme Court is that the procedure adopted by the trial Court in granting a subsequent mortgagee a decree on foot of his puisne mortgage is irregular. But, I have little doubt that the Court which directed the amendment had jurisdiction to direct the amendment. It cannot be said that the procedure adopted by the Court was one without jurisdiction though it may be attacked as

1. (1969) 2 S.C.J. 93 : A.I.R. 1969 S.C. 600.
2. (1884) 27 Ch.D. 246.

irregular. The appellants were parties to the order directing the amendment of the decree and if the order was wrong it was open to them to have taken up the order in appeal. They kept quiet and allowed the order to become final and binding upon them and long subsequently when the decree as amended was sought to be executed by the 8th defendant, they started raising objections. They are precluded by virtue of the order in I.A. No. 68 of 1963 from questioning either the propriety or the regularity or the legality of the amendment ordered by the Court. In *Mahadev Parshad* v *Mungi*[1] a Division Bench of that Court held that the validity of a decree depends upon the authority by which it is issued and the mandate that it contains and not upon the extent to which the language prescribed by the Code has been reproduced. The Court should look rather to the substantial effect intended by the decree than to the precise form of words which the Court has used. The law does not favour frivolous objections in regard to the form of the decree, for section 99, Civil Procedure Code, declares that no decree shall be reversed or substantially varied in appeal on account of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. It may be recalled that the respondent herein (the subsequent mortgagee) paid the full Court-fee due upon the puisne mortgage and thereafter obtained amendment of the decree which enabled her, irrespective of the conduct of the prior mortgagees, to bring the hypotheca to sale and discharge the puisne mortgage out of the sale proceeds thereof. A decree as amended must show on what judgment it is based, for and against whom it is issued and the amount to be taken from the latter for the benefit of the former. If, therefore, that decree specifies the precise amount which has to be recovered and it directs that the recovery shall be made by the sale of the mortgaged property, the executing Court has no option but to execute the decree. It has no jurisdiction to go into the question whether the form of the decree granted by the trial Court was substantially in accordance with the procedure prescribed by the Code of Civil Procedure.] It has been held by a Division Bench of this Court in *Venkata Reddayya* v. *Kondala Rao*[1], that the executing Court is not entitled to go behind the decree, which stands amended rightly or wrongly, and the executing Court will not even be entitled to hear the judgment-debtors when they claim that the amendment had been ordered without notice to them, or that the decree had been amended, when it had become time-barred. Their Lordships held that these two objections should have been agitated before the Court which passed the decree and which ordered the amendment. The position here is much worse because the amendment was ordered after notice to the appellants. Learned Counsel for the appellants relied upon a ruling in *Vedavyasa Ayyar* v. *Madura Hindu Sabha Nidhi Company, Limited*[2]. That was a case where a suit for sale by a prior mortgagee against the mortgagor and a puisne mortgagee was instituted and the decree not only directed the sale of the mortgaged properties for the amount found due to the prior mortgagee but also ascertained the amount due to the puisne mortgagee and ordered the payment to him of this amount out of the surplus sale proceeds. It was held that the puisne mortgagee was not entitled to execute the decree for the amount due to him, when no sale was held for the realisation of the amount due to the prior mortgagee, that the remedy of the puisne mortgagee was a suit for sale, and that the decree in the previous suit did not operate as *res judicata*. I fail to see how this ruling can help the appellants. The decree in that case clearly directed that the puisne mortgagee would be entitled to discharge himself only out of such excess sale proceeds as remained after discharging the prior mortgage. But, in this case, the decree as amended clearly granted the 8th defendant the right to bring the hypotheca to sale and discharge his puisne mortgage out of the sale proceeds thereof. As I have already stated, the propriety or regularity of this decree may be open to question. But the Court, which had the right to go wrong, decided, after hearing both the parties,

1. A.I.R. 1959 Punj. 565.

1. (1952) 2 M.L.J. 665 : A.I.R. 1953 Mad. 1007.
2. (1919) I.L.R. 42 Mad. 90 : 35 M.L.J. 639.

to grant such a decree and any objection to the propriety of the decree can be made only in an appeal against the order and not before the executing Court when the decree as amended is being put into execution. In fact, the Supreme Court has held in *Hira Lal* v. *Kali Nath*[1], that the validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some other such ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it. It can certainly not be contended that the Court that amended the decree in this case had no competence to grant a decree on foot of the puisne mortgage obtained by the 8th defendant. Had the 8th defendant instituted a suit upon the puisne mortgage, the Court undoubtedly had both territorial and pecuniary jurisdiction to decree such a suit. The objection raised by the appellants does not go to the root of the jurisdiction of the Court and it cannot therefore be raised in execution. In the result, I agree with the first appellate Court's view of the matter and dismiss the civil miscellaneous second appeal with costs. Leave refused.

S.J. ——— *Appeal dismissed.*

1. (1961) 2 S.C.J. 592 : (1961) 2 M.L.J. (S.C.) 157 : (1961) 2 An.W.R. (S.C.) 157 : (1962) 2 S.C.R. 747 : A.I.R. 1962 S.C. 159.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

A. R. Munuswamy Rajoo .. *Appellant**

v.

Hamsa Rani .. *Respondent.*

Hindu Marriage Act (XXV of 1955), *sections* 25, 26—*Wife's petition for restitution of conjugal rights—Decree—Subsequent application for alimony for self and child—Maintainability—Scope of section* 25.

It will be found from section 25 (1) of the Hindu Marriage Act, that an application for the maintenance of the wife may be made either at the time the Court passes the decree granting matrimonial relief or at any time subsequent thereto. [*Para.* 4.]

Under section 26 the jurisdiction to pass orders with respect to the custody, maintenance and education of minor children continues even after the main proceeding, initiated under the Act, has come to an end. These orders are essentially in the nature of interim orders and are liable to be modified, revoked or suspended if there be a change in the relevant circumstances of the parties. [*Para.* 4.]

The language of section 25 is clumsy, though the clear intendment of the section is that any Court exercising jurisdiction under the Hindu Marriage Act shall have power to award maintenance in any proceeding, be it one of judicial separation or for restitution of conjugal rights or for dissolution of marriage by divorce or for annulment of marriage by a decree of nullity. The heading in section 25 runs as follows : "Permanent alimony and maintenance". The heading suggests that it applies to all cases coming under the Hindu Marriage Act and not necessarily and exclusively to cases where the marital tie has been dissolved by an order of Court. [*Para.* 10.]

Cases referred to :

Minarani v. *Dasarath*, A.I.R. 1963 Cal. 428 ; *Fisher* v. *Fisher*, (1961) 2 S. W and Tr. 410 ; *Soleman Bibi* v. *East Indian Railway*, 37 Cal.W.N. 453 : A.I.R. 1933 Cal. 358 (2).

*A.A.A.O. No. 48 of 1972. 15*th February*, 1974.

Appeal against the order of the Court of the Principal City Civil Judge, Madras, dated 11th February, 1972 and made in C.M.A. No. 115 of 1971 in (I.A. No. 3800 of 1971 in O.P. No. 235 of 1968 VI Assistant Judge, City Civil Court, Madras.)

G. Venkataraman, for Appellant.

V. Janakiraman, for Respondent.

The Court made the following

ORDER.—The appellant Munuswamy Rajoo is the lawfully wedded husband of Hamsa Rani, the respondent. The marriage between the two took place on 6th June, 1963. A son was born out of the wedlock on 22nd December, 1964. The case of the respondent was that the appellant was having illicit intimacy with one Sundarammal and that consequently he treated her (the respondent) cruelly and drove her and her son away from his house on 16th October, 1966. The appellant filed a petition, O.P. No. 208 of 1966 against the respondent, for dissolution of the marriage on the ground of desertion and adultery. This petition was dismissed because the appellant failed to pay the litigation expenses and interim maintenance ordered by the Court. Unfortunately, the appellant allowed this order to become final. Meanwhile, the respondent-wife filed O.P. No. 235 of 1968 against the appellant-husband for restitution of conjugal rights. The appellant filed a counter vehemently contesting that petition on the ground that the respondent had deserted him and was living in adultery. These objections were over-ruled by the trial Court and a decree for restitution of conjugal rights was granted on 16th December, 1970. No appeal was filed against this decree either, with the result, it has also become final and binding upon the husband. Subsequent to the decree in O.P. No. 235 of 1968, the respondent filed I.A. No. 3800 of 1971 under section 25 of the Hindu Marriage Act, praying for a direction to the appellant to pay her Rs. 150 per month for her alimony as well as for the maintenance of her child, who is now about seven years old. Notice of this application was served upon the appellant, who filed a counter through Counsel raising several objections both to the maintainability of the application and to the quantum of the allowance claimed. The trial Court, on a consideration of the contentions, passed an order directing the appellant to pay Rs. 75 per month as alimony to the respondent and Rs. 25 per month as maintenance for the child till it attained majority. Against this order, the appellant preferred an appeal in C.M.A. No. 115 of 1971 on the file of the Principal Judge, City Civil Court, Madras, who, after a thorough discussion, confirmed the order of the trial Court and dismissed the appeal with costs. It is as against this dismissal that the present appeal has been filed.

2. I shall first deal with the objection relating to the quantum of the amount fixed. Admittedly, the appellant is an employee of the Food Corporation of India drawing a monthly salary of about Rs. 501 inclusive of all allowances. His case is that he is very sickly and that he has to support Sundarammal, his father's concubine, who has been bringing him up from his childhood. It is unnecessary to consider whether Sundarammal is the concubine of the appellant as alleged by the responsdent or the concubine of his father. Assuming that it is his duty to support that woman, his duty to support his lawfully wedded wife and his own legitimate son is even more imperative. The amount of Rs. 100 awarded for the maintenance of his wife and child constitutes but 1/5th of the gross monthly income that he is getting. It is true that the respondent owns 35 cents of land. There is no definite evidence as to the income it would fetch. Having regard to the extent of the land and its quality, I do not think that it would fetch any considerable income. Both the Courts below have, with reference to the relevant legal principles quantified the maintenance amount at Rs. 75 per month for the respondent and Rs. 25 per month for the child. I see little reason to interfere with the quantum concurrently fixed by both the Courts below.

3. It is next contended that an interlocutory application filed for alimony and maintenance after the disposal of O.P. No. 235 of 1968 is not maintainable. I am unable to agree.

Section 25 of the Hindu Marriage Act, 1955, runs as follows :—

> "(1) Any Court exercising jurisdiction under this Act may, *at the time of passing any decree or at any time subsequent thereto*, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, *while the applicant remains unmarried*, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the Court to be just ....
>
> (2) If the Court is satisfied that there is a charge in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.
>
> (3) If the Court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order."

4. It will be found from clause (1) of section 25 that the application for the maintenance of the wife may be made either at the time the Court passes the decree or at any time subsequent thereto. It is, therefore, wrong to contend that the application made by the wife for alimony subsequent to the disposal of the main O.P., is not maintainable. As regards the maintenance of the child, it is true that section 25 makes no reference thereto. But then section 26 of the Act provides :

> "In any proceeding under this Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children consistently with their wishes, wherever possible, and may, *after the decree*, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made."

It is clear from this section that the jurisdiction to pass orders with respect to the custody, maintenance and education of minor children continues even after the main proceeding, initiated under the Act, has come to an end. The expressions that "the Court may, *after the decree* upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children etc., "and" that the Court may also from time to time revoke, suspend or vary and such orders" would show that the decree in the main proceeding does not terminate the power of the Court to pass suitable orders relating to the custody, maintenance and education of the minor children. These orders are essentially in the nature of interim orders and are liable to be modified, revoked or suspended if there be a change in the relevant circumstances of the parties.

5. The contention that the Court would have no power to make a post-decretal order has, therefore, been rightly overruled by the Courts below. It is true that in the application filed by the respondent-wife, section 26 of the Act has not been quoted. But then, that is only a formal flaw and it cannot affect the substance of her prayer, which must be deemed to be one for a relief both under section 25 and section 26 of the Act.

6. One other contention raised by the appellant is that under rule 1 of the Rules framed by the Madras High Court under the Hindu Marriage Act, a petition under section 26 of the Act shall be initiated by an original petition and not by an Interlocutory Application like the one

filed by the respondent in the trial Court. Rule 1 says that the following proceedings under the Act shall be initiated by original petitions :—

(i) Under section 9 for restitution of conjugal rights ;

(ii) Under sub-section (1) of section 10 for judicial separation ;

(iii) Under sub-section (2) of section 10 for rescinding a decree for judicial separation ;

(iv) Under section 11 for declaring a marriage null and void ;

(v) Under section 12 for annulment of a marriage by a decree of nullity ;

(vi) Under section 13 for divorce;

(vii) Under section 26 to make orders and provisions with respect to the custody, maintenance and education of children. It is true that as per this Rule, proceedings under section 26 of the Act are to be initiated by means of an Original Petition. But then rule 2 of the same Rules says that "every other proceedings subsequent to the petition shall be by an interlocutory application."

7. In this case, the petition for restitution of conjugal rights under section 9 was initiated by an Original Petition in conformity with rule 1. As rule 2 says that every other proceeding subsequent to the petition shall be an interlocutory application, it may be construed to mean that once the main proceeding has been initiated by an Original Petition, any other proceeding like an application for maintenance subsequent to the petition can be by an interlocutory applications. At any rate, there is some ambiguity as to whether the party to a proceeding for restitution of conjugal rights, which has been initiated by an Original Petition, should necessarily file another original petition before invoking section 26 of the Act. Assuming that an original petition should have been filed by the respondent, I shall examine if her failure to do so should vitiate the proceedings. Be it noted that the appellant did not raise any objection to the maintainability of the interlocutory application on the ground now alleged. I have gone through the counter and I find that this objection was not raised at all there. Neither in the grounds of appeal in the C.M.A., nor in the grounds of appeal in this C.M.S.A., has this objection to the form of the petition been raised. I fail to see how this irregularity which, in my view, is immaterial, has in any manner prejudiced the appellant substantially. Notice of the Interlocutory Application was served upon him. He was given an opportunity to file a counter and it was open to him to lead evidence and substantiate his objections. I do not think that the failure of the respondent to file a verified Original Petition instead of an Interlocutory Application, supported by an affidavit, could in any manner prejudice the appellant.

8. Section 99, Civil Procedure Code, prescribes that "no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

9. The error committed by the respondent, if at all, is only a procedural error, not affecting the merits of the case or the jurisdiction of the Court. I am, therefore, not prepared to countenance this hypertechnical argument, which has been rightly rejected by the first appellate Court.

10. The next argument of learned Counsel of the appellant is no less hypertechnical. According to him, section 25 empowers the Court to award maintenance only to a spouse who "remains unmarried" and not to a person like the respondent who still "remains married" to the appellant. The language of the section is clumsy, though the clear intendment of the section is that any Court exercising jurisdiction under the Hindu Marriage Act shall have the power to award maintenance in any proceeding, be it one for judicial separation or for restitution of conjugal rights or for dissolution of marriage by divorce or for annulment of marriage by a decree of nullity. This view is fortified both by the heading of the section and the language of the principal clause in the section. The heading in section 25 runs as follows : "Permanent alimony and maintenance". The heading suggests that it applies to

all cases coming under the Hindu Marriage Act and not necessarily and exclusively to cases where the marital tie has been dissolved by an order of Court.

11. In fact, the main clause in the section —"any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto ...... shall ...... pay to the applicant for her or his maintenance" etc., ... indicates the legislative intent to confer upon any Court exercising jurisdiction under the Hindu Marriage Act, the power to award maintenance in any proceeding under the Act. But unfortunately, later on, in a subordinate clause, the Legislature uses the words "while the applicant remains unmarried". This expression is not intended to cut down or curtail the scope of section 25. Nor can it be construed as applying only to a case of a dissolution of marriage or an annulment of marriage. In the last two cases, no doubt the order should direct the respondent to pay alimony only so long as the applicant remains unmarried. But in the other types of cases, where even after the decree, the marital tie continues to bind both parties, it is undoubtedly within the power of the Court, as in fact it is its duty, to award maintenance to the spouse entitled thereto. It is, therefore, wrong to whittle down the scope of section 25 by invoking the clumsy phrase, "while the applicant remains unmarried", a phrase, which has been inadvertently used by an unimaginative draftman. The phrase "while the applicant remains unmarried" was evidently intended to do duty for the expression, "while the applicant remains without incurring any legal disability, justifying the rescission of the allowance awarded under the decree". It is the duty of the Court to put a construction upon the section, which does not attribute absurdity to the Legislature and which would advance the remedy and suppress the mischief. A Division Bench of the Calcutta High Court arrived at the same conclusion, but by adopting a somewhat different route.

12. In *Minarani* v. *Dasarath*[1], a similar argument was advanced. On behalf of the husband, it was urged that since the payment of maintenance under section 25 of the Hindu Marriage Act, must be limited to the period "while the applicant remains unmarried", the applicant under the section must satisfy the condition that she or he was "unmarried", and as the petitioner had not obtained a decree of divorce or nullity, she was not unmarried, being still the married wife of the opposite party, and consequently her application under section 25 was not maintainable. This argument was repelled by the learned Judges of the Calcutta High Court in the following words :

> "An order for separate maintenance under section 25 may be passed in favour of a married woman living apart from her husband, *e.g.*, on the passing of decree for judicial separation or of the passing of a decree for restitution of conjugal rights in the event of the decree not being complied with. (This is exactly the case here.) The expression "any decree" in section 25 is broad enough to cover any decree of divorce or nullity or of judicial separation or for restitution of conjugal rights. The heading and the body of the section refer to "maintenance", "permanent alimony" and "payment of periodical sums" which under the English practice are respectively the names of allowances granted after the passing of a decree of divorce or nullity, a decree of judicial separation and a decree for restitution of conjugal rights .... The scheme of sections 24, 25 and 26 of the Hindu Marriage Act, 1955, appears to be that the Court is vested with the power of passing orders for maintenance of a spouse and for the custody, maintenance and education of minor children of the marriage during the pendency of any proceeding as also on the passing of any decree under sections 9 to 14 of the Act. In a proper case the Court has, therefore, the power under section 25 to pass an order for maintenance in favour of the applicant who is a married woman. The condition that the maintenance is to be paid "while the applicant remains unmarried" is attached to every order for maintenance passed under section 25. In the context of section 25 (1) the condition means "while the applicant is not remarried."

1. A.I.R. 1963 Cal. 428.

This condition recalls to our mind the clause "*dum sola et casta vixerit*", which means "while she remains chaste and unmarried". Under the English practice, formerly, it was usual to attach those conditions to an order for maintenance of the wife after a decree of divorce or nullity, see *Fisher* v. *Fisher*[1] but now the insertion of either condition has become the exception rather than the rule, Halsbury's Laws of England., Articles 983, 984 and Raydon on Divorce, 8th Edition, pages 742-43. The rigid policy of section 25 of the Hindu Marriage Act, 1955, however, is that a party in whose favour an order for maintenance is passed cannot claim any maintenance under the order if subsequently the party has re-married or has become guilty of sexual immorality ; the Court has no discretion in the matter ; upon the party's re-marriage the maintenance ceases and the Court must rescind the order. The Court is also bound to rescind the order on the party becoming guilty of sexual immorality as mentioned in the section. The word "unmarried" has several meanings. An interesting discussion of its meaning will be found in the case of *Soleman Bibi* v. *East Indian Railway*[2]. The popular meaning of the word is "never having been married". Its dictionary meaning is "not married". Now the word "unmarried" in section 25 (1) cannot mean "never having been married", because the applicant must have been a husband or a wife and therefore must have been married ; nor can it mean "not married"; for an order under section 25 may be passed in favour of a married woman on the passing of a decree of judicial separation or for restitution of conjugal rights. In the context of section 25 (1) the word means "not re-married", for this reason section 25 (3) provides *inter alia* for rescission of the order if she was re-married. The reason for attaching the condition "while the applicant remains unmarried" to an order for maintenance passed in favour of a married woman after a decree of judicial separation or for restitution of conjugal rights may be that the order will remain effective though she subsequently obtains a decree of divorce or nullity and becomes free to marry again. The petitioner not having re-married was for purposes of section 25 "unmarried" and her application cannot be dismissed on the ground that she was not unmarried."

13. The above observations of the Calcutta High Court proceed on the assumption (with which I agree) that the clause in question does not say what it really means. I am not sure if the emendation suggested by their Lordships would effectively solve all the problems. In the total context of the section, the words "while the applicant remains unmarried" may best be construed, in my view, to mean "so long as the applicant continues to remain entitled, in the eye of law, to maintenance" The inelegant and inadequately constructed subordinate clause in the section shuts out of its imagination and contemplation two out of the four contingencies indubitably contemplated by the principal clause in the section and there is little reason why the amplitude of the whole section should be curtailed by harping upon an unintended error that has crept into the subordinate clause in the section.

14. As for the custody of the child, I may observe that the child has been in maternal custody ever since its birth, and the father, namely, the appellant has never issued any notice evincing any anxiety to get custody of the child or calling upon the respondent to hand over custody of the child. It is indeed amazing that neither in the proceedings which he initiated for dissolution of the marriage on the ground of adultery nor in the counter that he filed in his wife's application for restitution of conjugal rights, did he show any anxiety to take over the custody of the child. Only in his counter to I.A. No. 3800 of 1971, in which his wife prayed for maintenance, did he say in a casual and half-hearted manner that he was prepared to keep custody of the child. Having regard to the tender age of the child and having regard to the past conduct of the parties in relation to the child, the order passed by the Courts below directing the father to pay maintenance at the rate of Rs. 25 so long as the child is in the custody of the mother is justified.

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1. (1961) 2 S.W. and T.R. 410.
2. 37 Cal. W.N. 453: A.I.R. 1933 Cal. 358 (2).

It is open to the appellant, if he is so advised and if the circumstances change to move the Court for modification, alteration or rescission of the order relating to child custody and the quantum of maintenance.

15. In the result, this appeals fails and will stand dismissed with costs. Leave refused.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

Meghraj .. *Petitioner* *

v.

Jesraj Kasturjee and another .. *Respondents.*

Limitation Act (XXXVI of 1963), section 5—Excusing delay—Written or formal application, if necessary.

The language of section 5 of the Limitation Act does not expressly or by necessary implication mandate the filing of a written application to obtain relief under that section. [*Para.* 3.]

If under explainable circumstances an appeal or an application is filed in Court, but without a formal application or a written application for excusing the delay in the presentation of the same then the Court should circumvent technicality and afford a reasonable opportunity to the aggrieved party to mend matters. Otherwise it would lead to miscarriage of justice. [*Para.* 4.]

Cases referred to :—

Mt. Kulsoomun Nissa v. *Noor Mohammad*, A.I.R. 1936 All. 666 ; *Firm Kaura Mal* v. *Firm Mathra Dass*, A.I.R. 1959 Punj. 646.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Principal Judge, City Civil Judge, Madras, dated 23rd June, 1970 and made in C.M.A. No. 19 of 1970 (in I.A. No. 18309 of 1968 in O.S. No. 330 of 1966 II Assistant Judge City Civil Court, Madras.)

P. V. Subramanyam, for Petitioner.

Himmatlal Mardia, for Respondents.

*C.R.P. No. 1279 of 1971. 22*nd March*, 1974.

The Court made the following

ORDER.—An application under Order 9, rule 9 of the Code of Civil Procedure, was filed by the defendant in O.S. No. 330 of 1966 on the file of the City Civil Court, Madras, to set aside the *ex parte* decree passed in that suit on 29th October, 1968 and to restore the suit on the file for being disposed of in accordance with law. This application was filed on 29th November, 1968. When it came up for hearing before the II Assistant Judge, City Civil Court, Madras, the learned Judge after hearing both sides, accepted the contention of the respondent that the petition was barred by limitation and in view of the fact that no petition for excusing the delay under section 5 of the Limitation Act was filed along with the petition to set aside the *ex parte* decree, he dismissed the application. C.M.A. No. 19 of 1970 was preferred to the Principal Judge, City Civil Court, Madras. The learned appellate Judge noted that there was a day's delay in the presentation of the application. But he was in accord with the learned Assistant Judge that as there was no application, apparently a written application, under section 5 of the Limitation Act, the main application was not maintainable. He relied upon an unreported decision of this Court in C.R.P. No. 2312 of 1966 (Gety Brothers and Company, Madras — Petitioner : Argaral Adamji and 3 others — Respondents); he would not agree with the contention of the petitioner that the delay of a day was not wilful and that the reasons given in the affidavit in support of the main application for such a day's delay ought to be noticed before final orders are passed. On the only ground that there was no prayer to excuse the delay in the filing of the main application, the Court declined to interfere and admit the application by excusing the day's delay. It is as against this, the present civil revision petition has been filed.

2. Mr. P. V. Subramaniam, the learned Counsel for the petitioner contends that the Court ought to have given him an opportunity to file an affidavit, or indeed a petition under section 5 of the Limitation Act setting forth the circumstances under which the day's delay has occurred. In any event, he would state that an oral application was made before the Courts

below and that by itself was sufficient for the Courts to go into the sufficiency of the cause of delay and find whether the application to set aside the *ex parte* decree could ultimately be entertained or not. Such an opportunity was denied to the petitioner both by the first Court as well as the appellate Court. As the order of dismissal of both the Courts below are founded purely on technical grounds, he prays for the restoration of the application or in the alternative for a remand of this subject to the first Court for a re-appraisal of the facts after giving an opportunity to both parties to state their respective contentions as regards the sufficiency or otherwise of the day's delay. Mr. Himmatlal Mardia, appearing for the first respondent however seriously contends that the laches on the part of the petitioner cannot be cured by an oral application and that it is not necessary in the eye of law to give the petitioner a second opportunity to state his reasons for the day's delay, as it would cause prejudice to the respondents. Of course, reliance is placed on the decision of our Court cited above.

3. Before I deal with the authorities, which are relevant for the purposes of this case, it is necessary to look into the text of section 5 of the Limitation Act itself to find out its real purport and intendment of the Act. The language of section 5 of the Act does not expressly or by necessary implication mandate the filing of a written application to obtain relief under that section. It reads thus :

> "Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable (by or under any enactment) for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

It only says that any appeal or any application filed beyond the prescribed limit of time, under the section may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he has reasonable ground for not preferring the appeal or the application within the prescribed time. The entire tenor and language of section 5 leave therefore, a judicial discretion in Court in the matter of the application of the principle set out in section 5 of the Limitation Act. As all such rules are to be understood and applied as beneficial provisions, bare technicalities ought not to prevail over the pith and substance of the provisions. As I said, there is no warrant in the language of section 5 of the Act to lay down as an aximotic rule of procedure that unless an application in writing or any, other similar formal application accompanies either the appeal or the application in question, the Court ought not to take cognizance of the realities and ignore the substance of the sufficiency in the cause of each case and dismiss the said appeal or application for technical reasons, such as the absence of a written or a formal application. In fact each case has to be decided on its own facts. It is not as if that under all circumstances a written application should be ignored ; but in cases where by inadvertence or by a *bona fide* error of judgment, the party assisted by Counsel ushers into the portals of Court, certain records which are not full and complete, then such *bona fide* error of judgment should necessarily be taken into account by a Court which administers not only law but also equity hallowed by good conscience in ultimately deciding whether that unfortunate litigant deserves sympathy or not. It is in this way that I have said that section 5 of the Limitation Act vests a judicial discretion in Courts dealing with such matters. In C.R.P. No. 2312 of 1966, the learned Judge in the circumstances noticed by him was not inclined to admit a petition without an application for excusing the delay. No doubt the observation is that no petition for excusing the delay in filing the petition to set aside the *ex parte* decree was filed and that in those circumstances there was no other option than to uphold a plea of the petitioner that the petition for setting aside the *ex parte* decree was barred. But in the view I have expressed before and having regard to the judicial precedents in the past and particularly of the Division Bench of the Allahabad High Court presided over by Sulaiman, C.J., I am of the view that no such formal application or written application is

aboslutely necessary. In deserving cases Courts can in exercise of their inherent power and certainly in order to channelise beneficially their judicial discretion, excuse the delay even on an oral application, having regard to the circumstances of that particular case. In the instant case, there was a day's delay. The learned Counsel, who presented the application has explained before me and in the presence of the first respondent that he made a *bona fide* mistake in that he calculated the number of days available in the month of October, as 30 instead of 31 days. It is human to err and whether this explanation of the learned Counsel is sufficient or not has not been adverted to by the Courts below. For my part I am satisfied about the *bona fides*; but I am not prepared to express any opinion about it in the view that I intend taking. Before parting with the case, I am obliged to refer to the decisions of the Allahabad and Punjab High Courts which have taken a view similar to the one I have indicated above.

4. In *Mt. Kulsoomun Nissa* v. *Noor Mohammad*[1] a Division Bench of that Court presided over by Sulaiman, C.J., and Bennett, J., was dealing with a case where a memorandum of appeal was filed beyond time, but without a written application for excusing the delay under section 5 of the Limitation Act. Considering this aspect Sulaiman, C.J., speaking for the Bench said :

> "The first ground on which the appeal has been dismissed by the lower appellate Court is that the plaintiffs had not made any formal application for an extension of time under section 5, Limitation Act, and that, therefore, their appeal against Hakim Shyam Sundar Lal was beyond time. In our opinion the Court below has erred in exercising its discretion in this matter. The reason why Hakim Shyam Sundar Lal's name was omitted from the names of the respondents obviously was that his name did not find a place in the decree. He was impleaded later on within 30 days of the substitution of his name. We think that the lower Court *should have allowed the defendant to get round the technical objection* of the absence of a formal application for extension of time."

To the same effect but in more clear language Dua, J., in *Firm Kaura Mal* v. *Firm Mathra Dass*[1] observed thus :

> "The discretion under section 5 of Limitation Act has to be a judicial discretion and not an arbitrary one. Merely because there was no written application filed by the appellant is hardly a sufficient ground for refusing him the relief, if he is otherwise entitled to it. Procedure is meant for advancing and not for obstructing the cause of justice ; and if the entire material is on the record, it cannot promote the ends of justice, if that material is ignored and the relief refused to the appellant, merely because he had not claimed it by means of a formal application in writing or that a formal affidavit was not filed. The language of section 5 also does not provide that an application in writing must be filed before relief under the said provision can be granted."

The consensus, therefore, appears to be this. If under explainable circumstances an appeal or an application is filed in Court, but without a formal application or a written application for excusing the delay in the presentation of the same, then the Court should circumvent technicality and afford a reasonable opportunity to the aggrieved party to mend matters. Otherwise, it would lead to miscarriage of justice.

5. In the instant case, the learned Counsel for the petitioner, who filed the papers in this Court has according to him sufficiently explained as to why he filed the papers beyond a day. But as I said I am not inclined to deal with that aspect because, the Court below did not advert to the circumstances under which the delay was caused.

6. Whilst therefore remitting the subject-matter to the appropriate City Civil Judge of the City Civil Court, Madras, I give an opportunity to the petitioner to file an affidavit explaining the circumstances under which he filed the

1. A.I.R. 1936 All. 666.

1. A.I.R. 1959 Punj. 646.

appeal a day after the prescribed period. The respondents of course, will have equally the opportunity to file a counter affidavit to the same. The learned Judge hearing the application on remit shall dispose of the said application but in the light of the observations made by me as above.

7. The civil revision petition is allowed to the extent indicated and there will be no order as to costs.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

T. C. Purushothaman and another .. *Petitioners.**

v.

D. V. Krishnan and others .. *Respondents.*

Arbitration Act (X of 1940), sections 33, 30 (a), (b), (c)—*Partnership—Misunderstanding between partners—Reference to arbitration—Award—Objection to award that it had been substituted—Objection comes within section* 33—*No time limit for raising objection.*

Where the complaint of a party to an arbitration agreement is that there has been a substitution of the award, then, in substance and effect the objection of that party is that the award produced into Court was never in existence so far as he is concerned. The objection comes within the four corners of the real intendment and purpose of the prescription in section 33 of the Arbitration Act. [*Paras.* 10 *and* 11.]

The objection which could be raised under section 33 of the Arbitration Act is not covered by any prescription as to time under the provisions of the Limitation Act. Hence the objection could be raised at any time. The period of limitation which is invokable in circumstances where an attack is made against an award is only with reference to such objections which could squarely come within clauses (*a*), (*b*) or (*c*), of section 30 of the Arbitration Act.

If, however, the objection could be brought within the four corners of the intendment of section 33, then, there is no period which limits an action by an aggrieved party in relation to such an award. [*Para.* 12.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Principal Subordinate Judge, Salem, dated 5th November, 1971 made in O. P. No. 22 of 1966 and I. A. No. 66 of 1966.

D. Peter Francis for *K. Parasaran* and *P. Seshadri*, for Petitioners.

K. Sarvabhauman, for Respondents.

The Court made the following

ORDER.—The petitioners and the respondents were partners in a business which was run under the name and style of 'Uma Trading Company.' Misunderstanding arose between them and their disputes were referred, under a specific arbitration agreement dated 20th October, 1965, to five individuals *viz.*, Subramaniam Chettiar, Venugopal Chettiar, Mahalinga Mudaliar, Shanmughasundaram and Meenakshisundaram Chettiar. According to one of the Arbitrators, Venugopal Chettiar, who claimed to be the President of the Board of arbitrators the board entered upon the reference after accepting the arbitration agreement and the reference, and after several sittings in October, 1965 the final award was recorded on stamp paper. It is not in dispute before me that the same was registered on 27th October, 1965, and was also minuted in the book kept by the arbitrators. The President of the board of arbitrators, after having thus completed the award, filed it into Court after giving notice of the said award to the parties. The said proceedings were numbered as O. P. No. 22 of 1966. The petitioners herein thereafter filed I.A. No. 66 of 1966 in the main O.P. No. 22 of 1966 filed as above by the President of the arbitrator and sought for a decree in terms of the award.

2. The respondents herein took notice of the award and also the proceedings in Court and the stand of the petitioners

*C.R.P. No. 1709 of 1972. 11*th April,* 1974.

to pass a decree in terms of the award. They took such notice on 16th February, 1966. The first hearing of the proceedings was on 28th February, 1966. Even then the respondents did not file any independent application or any counter to I. A. No. 66 of 1966 filed by the petitioners wherein they sought for a decree in terms of the award produced by the President of the board of arbitrators into Court in the main original petition. But, on 28th March, 1966, the respondents filed a counter stating that the arbitration agreement was purely one-sided, that the award passed on 28th October, 1965 by the arbitrators was *ab initio* void inasmuch as the mandatory provisions of section 14 (1) of the Arbitration Act have not been complied with and that the arbitration award has been signed only by the President and not by all. Lastly, the respondents took up the position that even if an award has since been passed by the arbitators in the regular course, the award produced into Court is a forged one ; according to the respondents, from the original award some papers have been removed and some other papers have been introduced, and, while in the original award they had signed along with others, that was not to be found in the award now produced into Court, on the basis of which a decree is sought for by the petitioners.

To this, a rejoinder was made by the petitioners. The main contention of the petitioners in the rejoinder was that it was not open to the respondents to challenge the award, as no application had been made within thirty days from the date of the filing of the award into Court or from the date when they had knowledge of the same, and that the respondents cannot challenge the award in any manner.

3. The lower Court, however, considered the last objection of the respondents that the award now in Court was not the award which was passed by the arbitrators and in that sense the award on which a decree is sought, is a non-existent award and therefore an enquiry has to be made under section 33 of the Arbitration Act to consider the challenge now posed by the respondents, and it is only after the Court comes to the conclusion one way or the other in the enquiry, to be undertaken under section 33, the other aspects of the contentions, whether the petitioners are entitled to a decree on the basis of the award if otherwise invalid, could be considered. The lower Court accepted the contention of the respondents and directed such an enquiry. It is as against this, the present civil revision petition has been filed.

4. Learned Counsel for the petitioners drew my attention to the relevant provisions of the Arbitration Act as also the provisions of the Limitation Act of 1963 and contended that this is not a case in which section 33 of the Arbitration Act is applicable and that the respondents' challenge is only directed towards the merits and the conduct of the arbitrators in the course of the proceedings and their objections could only be understood as one against the award or its 'improper procuration' or its 'invalidity' and not as an objection which could be understood to be relatable to the 'existence' of an award within the meaning of section 33 of the Act.

5. On the other hand, learned Counsel for the respondents would state that the sum and substance of the objections of the respondents would cover the situation contemplated in section 33 of the Arbitration Act and therefore the direction of the Court below, which is to the effect that an opportunity should be given to the respondents to let in evidence regarding the alleged fabrication of the award', and its finding that it is not open to the respondents to put forward the other grounds alleged by them in the counter-affidavit, are correct.

6. Under the Arbitration Act, it is open to the arbitrators, after making the award, to give notice, in writing, to the parties, of such making and signing, and inform them of the amount of fees and charges payable in respect of the arbitration and the award. It is open to the arbitrators, under section 14 (2) of the Arbitration Act, at the request of any party to the arbitration agreement or any person claiming under such party, or if so directed by the Court and upon payment of the fees and

charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which are connected with the proceedings, to be filed into Court, and the Court shall thereupon give notice to the parties of the filing of the award. Sections 14 (1) and 14 (2) deal with these situations.

7. We are not concerned, in the instant case, with sub-section (3) of section 14. In the instant case, the President of the board of arbitrators filed O.P. No. 22 of 1966 under section 14 of the Act, which was taken on file on 22nd January, 1966, and notice to all parties, *viz.*, the petitioners and the respondents, was ordered to be returnable on 28th February, 1966. Well within time, the petitioners filed I. A. No. 66 of 1966, seeking for a decree in terms of the award, But the respondents, for the first time, challenged the award in their counter-affidavit, filed on 28th March, 1966, without even filing an interlocutory application or an original petition for the purpose. In this counter-affidavit, as already stated, they alleged fraud and challenged the award produced into Court by the arbitrators as a fabricated or forged document.

8. It is no doubt true that under section 30 of the Arbitration Act the grounds on which an award could be set aside are expressly stated. There are three grounds on which an award could be set aside. The first one is that an arbitrator or an umpire has misconducted himself or misconducted the proceedings. The second ground is that the award has been made after the arbitrators have become *functus officio* or unable to proceed with the arbitration agreement due to an order of Court superseding the arbitration or by reason of the arbitration proceedings themselves having become invalid under section 35 of the Act. The third ground on which an award could be set aside is that it has been improperly procured or is otherwise invalid.

9. The respondents, in their counter-affidavit, filed on 28th March, 1966, have no doubt asked for setting aside of the award on the ground of misconduct of the arbitrators and also on the ground that it has been improperly procured or is otherwise invalid. But, admittedly, they filed the counter-affidavit beyond a period of thirty days from the notice of the filing of the award. Under Article 119 of the Limitation Act, 1963, a special period of time is prescribed in the matter of setting aside an award or getting an award remitted for reconsideration : A period of thirty days from the date of the service of the notice of the filing of the award is provided for. Therefore, it is not open to the respondents to seek the order from the Court below to set aside the award on any of the grounds mentioned in their counter-affidavit excepting on the ground that the award, according to them, is a fabricated or a forged one. The question, now, is whether such a challenge based on the ground that the award produced into Court, and of the filing of which notice has been given to a litigant, is a forged one or a fabricated one, would come within clauses (*a*), (*b*) and (*c*) of section 30 of the Arbitration Act.

10. There is a distinction between the force, effect and meaning of section 30 and of section 33 of the Arbitration Act. The purposes served by these two sections are distinct and separate. Whilst under section 30 of the Act the existence of an award could not be challenged, but the process leading to the making of the award could mostly be under attack, under section 33 the very existence of the said award could be in dispute. Again, under section 30 (*c*) of the Act, the invalidity, of the award is once again referable to the *modus operandi* adopted by the arbitrators in the matter of the passing of the award, but would not in my view, include a complaint that the award passed by the arbitrators has been replaced or substituted. In any case, where the complaint of a party to an arbitration agreement is that there has been such a substitution of the award, then, in substance and effect, the objection of that party is that the award produced into Court was never in existence so far as he is concerned. It is this distinction which has to be borne in mind while appreciating the objection of the party and while applying section 30 or section 33. It may be that while challenging the existence of an award

a party may say that the award is invalid; equally a party while admitting the existence of an award, may also characterise his challenge as if the arbitration agreement should not be considered to be in existence or valid. It is not by the nomenclature of the defence of any litigant that the purpose and substance of his objection should be understood; it has always to be reckoned and adjudged with reference to the facts and circumstances of each case and the weight and nature of the challenge against the award itself. A mere objection as to the invalidity of an award may not necessarily be equivalent to saying that there is no arbitration award at all, or such a complaint is equatable to one about the non-existence of an award. Equally when the non-existence of an award is pleaded or its invalidity attacked in the forefront, it should not always be said that the party seeks relief and desires relief only under section 33 of the Act. As I said, the distinction that has to be borne in mind while invoking the purpose behind the principles and prescriptions in the two sections, is that one goes to the very root of the existence of the award and the other relates to complaints about the process which led to the procuration of the award.

11. If this periphery of the purposes of both sections and their intendments are borne in mind, then, it is easy to comprehend that in the instant case the respondents' sole, purpose in their counter affidavit was to lay an attack on the award in Court on the only ground that it is a 'non-existent' award, in the sense that that was not the award which arbitrators passed after hearing the parties and that the one in Court is a substituted or a forged one. In this sense the objection comes within the four corners of the real intendment and purpose of the prescription in section 33 of the Arbitration Act.

12. The lower Court, therefore, was right in having permitted the respondents to let in evidence on that aspect alone treating their objection in the context as above as one coming within the purview of section 33 of the Act. I am unable to agree with the learned Counsel for the petitioners that the ground in regard to which the respondents have used expression like 'invalidity of the award' in attacking the award, is not relatable to its 'existence' but to its 'invalidity, within the meaning of section 30 (*c*) of the Act. The objection which could be raised under section 33 of the Act is not covered by any prescription as to time under the provisions of the Limitation Act. Such an objection could be raised at any time, as the law stands now. The period of limitation which is invokable in circumstances where an attack is made against an award is only with reference to such objections which could squarely come within clauses (*a*), (*b*) or (*c*) of section 30 of the Act. If, however, the objections could be brought within the four corners of the intendment of section 33, then, there is no period which limits or bars an action by an aggrieved party in relation to such an award. The lower Court has come to the correct conclusion.

13. The civil revision petition is dismissed. There will be no order as to costs.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam and S. Maharajan, JJ.*

Padmanabhan Nair and another .. *Appellants**

v.

Chinnan Nadar (died) and others .. *Respondents.*

Travancore-Cochin Holdings (Stay of Execution Proceedings) Act (VIII of 1950), *section 4—Landlord and tenant—Suit for eviction—Tenant in arrears of rent—Deposit of rent belatedly—Tenant whether entitled to benefits of Travancore-Cochin Act VIII of* 1950.

A landlord obtained a decree for eviction against the tenant for arrears of rent. Subsequently, the Travancore-Cochin Act VIII of 1950 came into force. The tenants did not pay the arrears of rent for three years subesquent to the decree

*L.P.A. No. 63 of 1971. *2nd April,* 1974.

and for over one year subsequent to the Act. The landlord filed an E. P. for recovery thereof. This petition was dismissed for some reason. The landlord once again filed an E. P. after some years for eviction. The tenant took some time to deposit the rent and deposited the same and claimed protection under the Travancore-Cochin Act VIII of 1950.

Held even if the Act required a wilful and intentional failure to pay the rent-arrears as a condition precedent to the Court denying the tenants the protecion of the Act,that condition would be fully satisfied in this case. The tenants had failed to pay the rent accruing due after the commencement of the Act and had thereby disentitled themselves to the protection under the Act. The Court had no option but to direct execution of the decree which had been granted for eviction even prior to the commencement of the Act. [*Para.* 3.]

Case referred to:—

Sanku Krishnan v. *Hari Prabhu, Govinda Prabhu and others,* A.I.R. 1952 Tra. Cochin 333.

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ganesan dated 23rd April, 1971 and made in A. A. A. O. No. 38 of 1968 preferred to the High Court against the order dated 2nd August, 1967 and made in C. M. A. No. 34 of 1966 on the file of the District Court. Kanyakumari at Nagercoil (E. P. No. 831 of 1959 in O. S. No. 176 of 1111, D. M. C. (Prl.) Kuzhithurai).

T. R. Ramachandran and *T. R. Rajagopalan,* for Appellants.

K. Sarvabhauman and *T. R. Mani,* for Respondents.

The Judgment of the Court was delivered by

Maharajan, J.—This appeal is directed against the judgment of Ganesan, J., under the following circumstances. In O. S. No. 176 of 1111 on the file of the Court of the additional District Munsif, Kuzhithurai, the 1st plaintiff obtained a decree for eviction against the respondents, their tenants. This decree was granted on 7th Dhanu 1124 (21st December, 1948). As per the decree, the landlord (plaintiff) was liable to pay the tenants 280 fs. 1 ch. and 2 ca. on account of the value of improvements effected by them and the tenants were liable to pay the landlord michavaram or rent at the rate of 190 fs. per annum upto the date of recovery of possession or three years from the date of the decree, whichever was earlier. Three years later, the 1st plaintiff filed E. P. No. 110 of 1951 after depositing into Court 280 fs. o ch. and 2 ca. In this Execution Petition he prayed for recovery of possession of the property and also for recovery of the michavaram due by the tenants for three years from the date of the decree at the rate of 190 fs. per annum. The tenants failed to pay the michavaram due by them. E. P. No. 110 of 1951 was pending for some time. Due to an injunction granted in another suit the plaintiffs could not obtain delivery in E. P. No. 110 of 1951. Consequently the petition was dismissed. The decree-holder died and plaintiffs 2 and 3 were impleaded on 19th August, 1960. The resourceful tenants denied that plaintiffs 2 and 3 were the sons of the decree-holder and a finding was given by the Court that they were the sons. This was done in E. P. No. 831 of 1959. Subsequently, on 12th February, 1963, the tenants filed E. A. No. 141 of 1963 in which they claimed that the value of improvements decreed in their favour on 21st December, 1948 should be refixed and that a Commissioner should be appointed in that behalf. This was opposed by the plaintiffs and it was held by the Court that it was not open to the tenants to reagitate the quantum of improvements which had been already fixed. Then the tenants filed E. A. No. 1135 of 1962 on 15th November, 1962 in which they prayed for two months time for payment of the rent arrears of 570 fs. due by them. They also contended that they were not liable to be evicted from the property because they were protected by the provisions of the Travancore-Cochin Act VIII of 1950. Then the landlord filed a petition in which he said that the tenants were not entitled to the protection of the Act and that even assuming that the Act was applicable to them, they were disentitled to the benefits of the Act.

because they had committed acts of waste. A Commissioner was appointed and accepting the report of the Commissioner, the Court held that acts of waste had been committed by the tenants and consequently directed eviction. In appeal, the appellate Court set aside the order of eviction on the ground that no wilful act of waste had been committed. The appellate Court also found that the tenants having deposited the arrears of rent due by them, though belatedly, had not forfeited the benefits under the Act. Against this the landlord preferred an appeal to this Court and the learned Judge dismissed the appeal without costs. It is against this judgment that the present Letters Patent Appeal has been filed.

2. Under section 4 of the Holdings (Stay of Execution Proceedings) Act, 1950, Travancore-Cochin Act VIII of 1950, notwithstanding any law to the contrary, proceedings in execution of a decree in a suit for recovery of possession of a holding shall, so far as they relate to the delivery of possession of the holding, be stayed. Admittedly, the property in question is a holding within the meaning of section 2 of the Act. There is a proviso to section 4 which runs as follows :

> "Provided that nothing contained in this section shall preclude the Court—
>
> (a) from ordering the delivery of possession of the holding to the decree-holder if the Court is satisfied either that the lessee has committed intentional and wilful acts of waste or that he has failed to pay the rent of the holding which has accrued due after the commencement of this Act ; or
>
> (b) from granting any other appropriate relief to which the decree-holder may be entitled."

In *Puliah Nadar* v. *M. K. Harihara Iyer and others*,[1] the Supreme Court has authoritatively construed section 4 of this Act. The relevant observations of the Supreme Court read as follows:

> "The only other point argued on behalf of the appellant was that, in any case, under the Travancore Act VIII of 1950, the Execution Court had the discretion not to grant the prayer for dispossession of the appellant even if there had been default in payment of pattom in accordance with the decree. Section 4 of the Act directs stay of execution of decrees for eviction, and the proviso to that section lays down that nothing in this section shall preclude the Court from ordering delivery of possession of the holding to the decree-holder, if the Court is satisfied either that the lessee has committed intentional or wilful acts of waste or that he has failed to pay the rent of the holding which has accrued due after the commencement of the Act. It was urged that this proviso only gives a power to the Execution Court to deliver possession and does not contain any mandate that, if there is any failure to pay arrears of pattom, the Execution Court must direct delivery of possession. Reliance was placed on the decision of the Travancore High Court in *Sanku Krishnan* v. *Hari Prabhu, Govinda Prabhu and others*[1], to urge that in this case it was open to the Execution Court to exercise its jurisdiction judicially and to refuse the prayer for delivery of possession on the ground that the appellant had been *bona fide* seeking reduction of pattom payable for Kumbhom 1956-57 from the Execution Court. There are two reasons why this submission cannot be accepted. The first is that, once the bar for execution of the decree by delivery of possession enforced by the principal clause of section 4 of the Travancore Act VIII of 1950 was removed because of the applicability of the proviso, the Execution Court had the duty to give full effect to the decree, execution of which was sought from it by the Respondent. The decree had given an absolute right to the respondent to dispossess the appellant on failure to pay the future pattom by the end of Kanni and Kumbhom each year and once the appellant committed a default, the respondent was entitled to dispossess him. There was, therefore, no reason why that Court could refuse to order delivery of possession;"

1. Civil Appeal Nos. 469, 174 of 1965.

1. A.I.R. 1952 Trav.-Co. 333.

It is, therefore, clear from the observations of their Lordships that the moment it is established had subsequent to the commencement of the Act the tenants have failed to pay the rent of the holding the decree granted before the commencement of the Act directing eviction of the tenants will have to be executed straightway, regardless of the question whether the failure to pay the rent was wilful or intentional. The words 'intentional' and 'wilful' used in clause (*a*) of the proviso qualify only the acts of waste and not failure to pay the rent.

3. Now we shall consider whether in this case the tenants, against whom a decree for eviction was granted on 21st December, 1948, committed default in payment of rent subsequent to the commencement of the Act. Travancore-Cochin Act VIII of 1950 came into force on 25th March, 1950, that is to say, about two years after the grant of the decree for eviction against the tenants. According to the decree, the tenants were liable to pay michavaram or rent at the rate of 190 fs per annum for a period of three years subsequent to 21st December, 1948, the date of decree. The tenants did not pay the arrears of rent for the three years subsequent to the decrec and for over one year subsequent to the Act, with the result the decree-holder had to file E. P. No. 110 of 1951 for recovery thereof. Even during the pendency of that Execution Petition the tenants failed to pay the arrears of rent. In E. P. No. 1135 of 1962 the tenants filed an application praying for two months time for payment of the arrears of rent due by them. At the time this application was filed, two years had elapsed since the commencement of the Act and the tenants actually deposited Rs. 481.38, the arrears due, only on 8th January, 1963. It is remarkable that they failed to pay the arrears till 1963. Even if the Act required a wilful and intentional failure to pay the rent-arrears as a condition precedent to the Court denying them the protection of the Act, that condition would be fully satisfied in this case. We, therefore, hold that the tenants have failed to pay the rent accruing due after the commencement of the Act and have thereby disentitled themselves to protection under the Act. The Court has no option but to direct execution of the decree which had been granted for eviction even prior to the commencement of the Act. The learned Judge failed to consider this aspect of the matter, though this question had been raised by the landlords even in the executing Court and the first appellate Court. The executing Court failed to deal with this question because, upon the ground of wilful act of waste, it decided against the tenants and directed eviction. As for the first appellate Court, it proceeded on the erroneous basis that unless the tenants committed intentional or wilful default in the payment of rent, they would be entitled to the protection under the Act. That is a view which is clearly contrary to the law as expounded by the Supreme Court. As we hold that the tenants are not entitled to the benefits of the Act because they have committed default in the payment of rent falling due subsequent to the commencement of the Act, we think it unnecessary to consider the question whether there has been any intentional or wilful act of waste of the part of the tenants.

4. In the result we allow the appeal and direct eviction of the tenants forthwith. The executing Court will, on payment of batta, if it has not been paid, direct delivery forthwith. No order as to costs.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

Koneridoss .. *Petitioner**

v.

N. Subbiah Naidu and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 22, *rule* 5—*Order passed in enquiry—Effect—Not appealable—Finding as to legal representative not* res judicata—*Bench decision directly on the point—Effect.*

The enquiry under Order 22, rule 5, Civil Procedure Code, is only summary in

*C.R.P. No. 1342 of 1973. 16*th April*, 1974.

character. Even though witnesses might be examined in support of the contention of either party to that proceeding, still the proceeding is only summary in character. [*Para.* 6.]

An order under Order 22, rule 5 of the Civil Procedure Code, is not an appealable one and no appeal lies against the order. [*Para.* 6.]

The finding that whether a person shall be admitted as a legal representative to continue a suit is not a question arising in the suit itself. It is a matter collateral to the suit and any decision arrived at cannot operate as *res judicata*. [*Para.* 6.]

When there is a Bench decision directly on a point, a subsequent Bench, unless it is a larger Bench, cannot possibly take a different view. [*Para.* 6.]

In a revision petition under section 115, Civil Procedure Code, it is not open to the revision petitioner to canvass the correctness or otherwise of a factual finding given by a lower Court. [*Para.* 4.]

Cases referred to:—

Rangubai v. *Sundarabai*, (1966) 2 S.C.J. 302 : (1965) 3 S.C.R. 211 : A.I.R. 1965 S.C. 1794 ; *Venkatakrishna Reddy* v. *Krishna Reddy*, I.L.R. (1926) Mad. 450 (F.B.) : 50 M.L.J. 485 : A.I.R. 1926 Mad. 586 ; *Pakkran* v. *Pathumma*, (1913) 25 M.L.J. 279 ; *Ram Kalap* v. *Banshu Dhar*, (1958) All.L.J. 8 ; *Appavoo Pillai* v. *Vijayammal Ammal*, (1972) 85 L.W. 936; *Rangaswami Naicker* v. *Rangammal*, (1968) 2 M.L.J. 610: 81 L.W. 583: A.I.R. 1969 Mad. 271.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Periyakulam, dated 25th April, 1973 and made in I.A. No. 282 of 1973 in I.A. No. 115 of 1968 in O.S. No. 36 of 1963.

M. Veluswami, for Petitioner.

N. Sivamani, for Respondents.

The Court made the following

ORDER.—This revision petition is against the order in I.A. No. 282 of 1973 in O.S. No. 36 of 1963 on the file of the District Munsif, Periyakulam, which is an application under Order 22, rule 5, Code of Civil Procedure. One Seethammal filed the above suit for partition. There was a preliminary decree and a second appeal (S.A. No. 935 of 1969) against the preliminary decree was pending in this Court. The said Seethammal died. Koneridoss, the present revision petitioner who is the husband's sister's son of the above said Seethammal first got himself impleaded as the legal representative of Seethammal, in the second appeal (S.A. No. 935 of 1969). He had been so impleaded as the seventh respondent in that second appeal. At a later stage, Subbiah Naidu, the contesting respondent herein, filed a petition before this Court in the above second appeal for getting himself impleaded as the legal representative of Seethammal on the ground that Seethammal had left a registered will under which he (Subbiah Naidu) is the sole legatee and that therefore he is the only legal representative of Seethammal. The abovesaid petition (C.M.P. No. 14623 of 1970 in S.A. No. 935 of 1969) was disposed of by Ramanujam, J. The learned Judge did not decide who among the two rival claimants is the legal representative of Seethammal but allowed both of them to be parties to the second appeal. Subbiah Naidu, (hereinafter referred to as the respondent) was added as the eighth respondent in the abovesaid second appeal. While Koneridoss (hereinafter referred to as the revision petitioner) had already been added as the seventh respondent in the second appeal. The learned Judge in that order observed that as there is rival claim as to who is the legal representative of deceased Seethammal both of them would be treated as legal representatives for the purpose of the second appeal and that such order is without prejudice to the contentions of either of the parties. The learned Judge also directed that the question regarding the genuineness of the will set up by the respondent herein is a matter to be agitated in separate proceedings.

2. After the disposal of the second appeal I.A. No. 115 of 1968 in O.S. No. 36 of 1963 came to be filed for passing a final decree. Then the respondent herein filed I.A. No. 282 of 1973, out of which the present revision petition arises, contending that by virtue of the will left by Seethammal, he is the legal representa-

tive entitled to continue the proceedings and that therefore he should be impleaded as the legal representative of Seethammal.

3. This application is under Order 22, rule 5, Code of Civil Procedure. The learned District Munsif on a consideration of the evidence placed before him held that the will propounded by the respondent is valid and that therefore he is the only legal representative of Seethammal and that the revision petitioner herein who claims to be the heir of Seethammal (husband's sister's son) is not the legal representative of Seethammal. It is this order that is questioned in the present revision petition.

4. Being a revision under section 115, Code of Civil Procedure, it is not open to the revision petitioner to canvass the correctness or otherwise of the factual finding given by the learned District Munsif regarding the will. The contention of the learned Counsel for the revision-petitioner is that in view of the order passed by Ramanujam, J. in C.M.P. No. 14623 of 1970 in S.A. No. 935 of 1969, the revision petitioner and the respondent should be allowed to continue as the legal representatives of Seethammal even in subsequent proceedings (final decree proceedings) and that the Court below is wrong in entertaining an application under Order 22. rule 5, Code of Civil Procedure, filed by the respondent herein. The learned Counsel referred to the decision of the Supreme Court reported in *Rangubai* v. *Sunderabai*[1]. It has been observed by the Supreme Court that if the legal representatives are brought on record at one stage of the suit, it will enure for the benefit of all subsequent stages of the suit. The contention of the learned Counsel is that the revision petitioner having been brought on record as the legal representatives of Seethammal in the second appeal which arose against the preliminary decree passed in the suit, such impleading will enure for all the subsequent stages including the final decree proceedings which are now pending in the trial Court. There can be no dispute that if once a legal representative is impleaded in a suit that would have effect in respect of subsequent proceedings in the same suit. But in the present case what has happened is, in the second appeal, the question as to who among the two rival claimants has to be impleaded as the legal representative of Seethammal had not been decided and the learned Judge (Ramanujam, J.) has specifically left open that question to be decided in separate proceedings. It would appear that while the revision petitioner came to be impleaded as the legal representative of Seethammal, the respondent and others had no notice of such application. Whatever that be, when the respondent filed the C.M.P. in the second appeal for getting himself impleaded as the legal representative on the basis of the will, the learned Judge did not go into the merits of the claim of the respective parties as to who is entitled to represent the estate of Seethammal but allowed both of them to be on record only for the limited purpose of the second appeal. As already seen, the learned Judge has reserved the dispute between the parties to be decided in separate proceedings.

5. The learned Counsel for the revision-petitioner contends that the separate proceedings contemplated by the learned Judge in his order in C.M.P. No. 14623 of 1970 is a separate suit and not a proceeding as the present one. The contention is that even in the final decree proceedings, both the revision petitioner and the respondent should be allowed to be parties as legal representatives of Seethammal and they ought to have been referred to a separate suit to resolve the dispute between them. Though the contention of the learned Counsel appears to be plausible, on a careful consideration I am of the view that the observation of the learned Judge in the abovesaid C.M.P. is not to be construed in the way in which the learned Counsel for the revision-petitioner wants to construe. The learned Judge could not have contemplated that in the final decree proceedings in the present suit both the rival claimants should be allowed to be on record without the Court deciding as to who among the two can properly represent the estate of Seethammal. If both of them are allowed to be on record it would lead to a strange situation. In the final decree, the Court

1. (1966) 2 S.C.J. 302 : (1965) 3 S.C.R. 211 : A.I.R. 1965 S.C. 1794 at p. 1797.

has to decide as to whom the share of Seethammal is to be allotted. That apart, with regard to the division of the suit properties by metes and bounds, the question would arise as to who among the two rival claimants should have a say. If both the rival claimants are allowed to be on record one may contend that the division of the property should be in a particular way and the other may take a different view in the matter. It would certainly create good deal of confusion. Under these circumstances when the learned Judge while disposing of C.M.P. No. 14623 of 1970 in Second Appeal No. 935 of 1969, left the dispute between the parties open, to be decided in separate proceedings, he could not have meant that the Court below is not expected to go into the question as to who among the two can properly represent the estate of Seethammal. Therefore the Court below is not wrong in entertaining I.A. No. 282 of 1973 under Order 22, rule 5, Civil Procedure Code, and holding that the respondent is the legal representative of Seethammal. The revision petitioner, therefore, should fail.

6. However, it must be made clear that the finding of the Court below regarding the validity of the will propounded by the respondent is not *res judicata* in any suit that might be instituted by the revision-petitioner herein. It must be remembered that an order under Order 22, rule 5, Civil Procedure Code, is not an appealable one. Because it is not appealable the present revision petition has been filed as against that order. There is no dispute that the order passed by the Court below is not an appealable one. In fact it has been pointed out by a Full Bench of this Court in *Venkatakrishna Reddy* v. *Krishna Reddy*[1] that no appeal lies against tan order under Order 22, rule 5, Civil Procedure Code. The enquiry made under Order 22, rule 5, Civil Procedure Code is only summary in character. Even though witnesses might be examined in support of the contention of either party to that proceedings, still the proceeding is only summary in character. In *Pakkaran* v. *Pathumma*[2], it has been held that the question whether a person should be admitted as the legal representative of the plaintiff to continue a suit cannot be regarded as one of the questions arising in the suit itself being only a matter collateral to the suit and any decision arrived at cannot operate as *res judicata* when a question arises in some other suit as to succession to the deceased. A Division Bench of the Allahabad High Court has also taken a similar view in *Ram Kalap* v. *Banshu Dhar*[1]. However, the learned Counsel for the revision-petitioner points out that in view of the decision of a Division Bench of this Court reported in *Appavoo Pillai* v. *Vijayammal Ammal*[2] difficulty might arise for the revision-petitioner if he files a suit to establish his right to the estate of Seethammal. In the above decision, the Division Bench has observed that the decision of the Court regarding who among the rival claimants is the legal representative would operate as constructive *res judicata* in a subsequent suit. But that is a case where the dispute as to who is the legal representative of a deceased person arose in execution proceedings. Therefore the decision of the Court regarding who among the rival claimants was the legal representative became an appealable order by virtue of section 47, Code of Civil Procedure. It should be noted that under section 47 (3) where a question arises as to whether any person is or is not a representative of the party such question shall for the purpose of that section be determined by the Court. Therefore if an executing Court decides as to who among the rival claimants is the legal representative of a party, that decision is appealable. In *Rangaswami Naicker* v. *Rangammal*[3], Venkataraman, J., has also taken the same view. Even though the Division Bench which decided *Appavoo Pillai* v. *Vijayammal Ammal*[2] had not stated so, I am clearly of the view that because the order regarding the legal representative in that case was one falling under section 47, Civil Procedure Code, and therefore it was appealable, the Division Bench has held that under such circumstances it would operate as *res judicata* in a subsequent suit. If such a

1. I.L.R. (1926) 49 Mad. 450 (F.B.) : A.I.R. 1926 Mad. 586 : 50 M.L.J. 485.
2. (1913) 25 M.L.J. 279.

1. 1958 All. L.J. 8.
2. (1972) 85 L.W. 936.
3. (1968) 2 M.L.J. 610 : 81 L.W. 583 : A.I.R. 1969 Mad. 271.

view is not taken of the above decision of the Division Bench it would be going counter to the decision of this Court in *Pakkaran* v. *Pathumma*[1] already referred to which is also a decision by a Division Bench. When there is a Bench decision directly on the point, a subsequent Bench, unless it is a larger Bench, cannot possibly take a different view. Under these circumstances, the decision in *Appavoo Pillai* v. *Vijayammal Ammal*[2] would in no way prejudice the revision-petitioner in his right to file a separate suit to establish his claim to the estate of Seethammal. In fact this position is conceded by Mr. N. Sivamani, learned Counsel appearing for the respondent and he unequivocally stated that if and when the revision-petitioner files a suit claiming the estate of Seethammal, the plea that the decision in I.A. No. 282 of 1973 which is the subject-matter of the present revision petition is *res judicata* against the plaintiff would not be raised.

7. The revision petition fails and is dismissed. No costs.

R.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

K. A. Loganatha Naicker .. *Petitioner**

v.

S. R. Balasundaram Mudaliar .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (c)—*Petition for eviction—Additional accommodation—Finding necessary—Hardship the tenant is likely to suffer would outweigh the advantage to the landlord or* vice versa.

It is imperative for the authorities, in cases arising under section 10 (3) *(c)* of the Tamil Nadu Act (XVIII of 1960), to give a specific finding whether the hardship the tenant is likely to suffer would outweigh the advantage to the landlord or *vice versa*. Unless this aspect is noticed and adjudged upon by the statutory authorities, there is no complete enquiry as contemplated in regard to the petitions arising under section 10 (3) (*c*) of the Act. [*Para.* 3.]

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Order of the Court of Small Causes (II Judge), Madras, dated 28th April, 1972 and made in H.R.A. No. 720 of 1971 (H.R.C. No. 696 of 1970 Court of Small Causes (VI Judge) Madras).

V. Janakiraman and *V. Gajapathy*, for Appellant.

T. K. Subba Rao and *N. S. Damodaran*, for Respondent.

The Court delivered the following

JUDGMENT.—The respondent filed an application under section 10 (3) (*c*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (XVIII of 1960), and also on the ground that the petitioner (tenant) has committed wilful default. The Rent Controller dismissed the petition on both the grounds. The appellate authority allowed the petition on both the grounds. The appellate authority found that the non-payment of rent was wilful and that it is left to the landlord to make a choice as regards the portion of his own building for further or additional accommodation and it is not for the tenant to dictate as to which portion in the said house is convenient to the landlord. But, on the question whether an eviction should be ordered under section 10 (3) (*c*), no definite finding has been given either by the Rent Controller or by the appellate authority regarding the crucial issue which arises in those cases on the question of hardship which is likely to be caused to the tenant by reason of such an order of eviction asked for by the landlord.

2. In cases arising under section 10 (3) (*c*) of the Act, certain stated considerations arise besides the normal features which usually come up for decision in Courts in the matter of the acceptance or rejection of application for eviction filed by landlords for additional accommodation.

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1. (1913) 25 M.L.J. 279.
2. (1972) 85 L.W. 936.
*C.R.P. No. 2066 of 1972. 19*th April*, 1974.

I am not generally considering in this order the various prescriptions and the necessary corollaries which have to be noticed and on which a finding has to be given by the authorities dealing with eviction matters. We are here concerned with an application under section 10 (3) (*c*) and I shall therefore deal with the normal and the special circumstances attendant upon such an application for additional accommodation.

3. Under section 10 (3) (*c*), a landlord who is keeping a part of the building, whether residential or non-residential, may notwithstanding anything contained in clause (*a*) of sub-section (3), apply to the Controller for an order directing the tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purposes or purposes of business which he is carrying on, as the case may be. The common features which are to be taken notice of by the Controller and the appellate authority, while dealing with such application, are that the Controller or the appellate authority as the case may be, should firstly be satisfied that the claim of the landlord is *bona fide* and if he is so satisfied, shall make an order directing the tenant to put the landlord in possession of the part of the building for the possession of which the application for additional accommodation has been filed. If the Controller on the appellate authority is not so satisfied, then he shall make an order rejecting the application. The above special feature, in an application for such an additional accommodation under section 10 (3) (*c*), is subject to the proviso to section 3 (*e*) of the Act. The proviso says that in cases where an application is made by a landlord for possession of a part of the building, whether residential or non-residential, when he is in possession of the other part of the building, then the Controller shall reject the application if he is satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord. The further proviso to this sub-clause enables the Controller to give the tenant a reasonable time for putting the landlord in possession of the part of the building asked for and to extend the said time so as not to exceed three months in the aggregate. The crucial aspect, therefore, which according to me could be characterised as a special incident in matters arising under section 10 (3) (*c*), is that there should be a categorical finding by the statutory authorities that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord. The special prescription is not to be considered as otiose or as an irrelevant appendage in the statute. It has been specially provided for so as to avoid unnecessary hardship to the tenant, as in the case under consideration the landlord is only seeking additional accommodation in the same premises, whether for residential or non-residential purposes. Therefore, it becomes absolutely imperative for the authorities, in cases arising under section (3) (*c*) of the Act, to give a specific finding whether the hardship which the tenant is likely to suffer would outweigh the advantage to the landlord or *vice versa*. Unless this aspect is noticed and adjudged upon by the statutory authorities, there is no complete enquiry as the statute contemplates in regard to the petitions arising under section 10 (3) (*c*).

4. Such an enquiry has not been undertaken in this case and the result is that no specific finding has been given by the appellate authority or the Rent Controller on this matter. There has not been, therefore, a proper disposal of the application under section 10 (3) (*c*) as contemplated by the statute.

5. Whilst, therefore, allowing the civil revision petition, the subject-matter is remitted to the Rent Controller for him to hear parties again and give a finding on the evidence on record, whether the hardship to the tenant would outweigh the advantage to the landlord or otherwise and to dispose of the case afresh in accordance with law. There will be no order as to costs.

S.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

Muniammal .. *Appellant**

v.

G. Mohan and others .. *Respondents*

Motor Vehicles Act (IV of 1939) *—Lorry—Accident resulting in death of victim—Claim by widow for compensation—Latent defects—*Maxim res ipsa loquitur*—Duty of driver and owner—Negligence of driver—Liability to compensate.*

Where the facts established show that the proper and natural inference arising therefrom is that the injury complained of was caused by the driver's negligence or when the doctrine of *res ipso loquitur* applies and a presumption of fault is raised against the driver of the lorry and vicariously against the master, the latter, if they are to succeed in their defence, must overcome the inference or the presumption by contrary evidence. The burden on them will be to show that the act complained of could have reasonably happened without negligence on their part. [*Para.* 2.]

If there had been a latent defect the liability can be got over only if it is established by evidence that the latent defect was not discoverable in spite of reasonable care. [*Para.* 3.]

Cases referred to :—

Lakshmiammal v. *State of Tamil Nadu*, (1974) 87 L.W. 249 ; *Tan Chye Choo* v. *Chong Kew Moi*, (1970) A.C.J. (P.C.) 325.

Appeal against the order of the Motor Accidents Claims Tribunal, Court of Small Causes (Chief Judge) Madras, dated 17th September, 1971 and made in O.P. No. 703 of 1969.

S. Venkataraman, R. Krishnaswami and *P. R. Selvaraj*, for Appellant.

A. Devanathan, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the claimant against the order of the Motor Accidents Claims Tribunal, Madras, dismissing her petition under section 110-A of the Motor Vehicles Act, claiming a compensation of Rs. 15,000 for the death of her husband, Munuswamy in a lorry accident. The accident took place at about 10-30 A.M. on 3rd November, 1969, at the junction between Waltax Road and the Basin Water Works Street. The deceased was pulling a hand cart laden with medicines in a northerly direction along the Waltax Road (which is a north-south road), and was turning in an easterly direction towards the Basin Water Works Street, when a lorry bearing MDU 5802 belonging to the third respondent and insured with the second respondent came at great speed in a southerly direction knocked against the cart, ran over Munuswamy killing him on the spot, proceeded to a distance of about 40 feet, then knocked against another cart and stopped short after travelling a further distance of 20 feet. Exhibit P-3 is the rough sketch of the scene of accident prepared by P.W. 5, the investigating police officer and it shows that the Waltax Road is 50 feet broad at the scene of accident and the accident itself took place about 20 feet to the west of the eastern edge of the road. The lorry was loaded with 93 bags of rice. Judging from the distance it travelled after the double collision, there can be little doubt that it was driven at an excessive speed. According to the lorry-driver, who has been examined as R.W. 1, there were a number of lorries parked on either side of the road. Having regard to these admitted facts as well as to the circumstance that the lorry was crossing a junction between the Waltax Road and the Basin Water Works Street, one would expect the driver of the lorry to have come at a considerably lower speed. According to the lorry-driver, he saw the hand cart of Munuswamy turning into Basin Water Works Street at a distance of 30 feet and thereupon he swerved his lorry to the left and applied the foot-brake, but the foot-brake did not act because of a rupture of the brake cylinder. The evidence of R.W. 2, the Motor Vehicles Inspector, who inspected the lorry a few hours after the accident, is that the foot-brake had completely failed due to the failure of the rear right side wheel cylinder.

*A.A.O. No. 300 of 1972. 26*th April*, 1974.

Having regard to the evidence of R.W. 1 and R.W. 2, the Tribunal came to the conclusion that the accident was an inevitable one and that it was due to an unforseeable defect in the wheel cylinder. Upon this finding, the Tribunal held that the accident was not due to rashness or negligence on the part of the lorry-driver and that consequently, the claimant was not entitled to any compensation.

2. Learned Counsel for the appellant has advanced the legitimate criticism that the Tribunal has accepted a plea which was not put forward by the respondents in their counter. Though the first respondent, who is the driver of the lorry, came into the witness box to speak to the inevitable character of the accident he did not choose to file a counter to the petition of the appellant. As for the counter filed by the second respondent, the insurer, the only plea taken therein was that the accident was the result of negligence on the part of the hand-cart-puller and not the result of any rashness or negligence of the lorry-driver. Be it noted that in this counter the plea of inevitable accident was not so much as hinted at. As for the third respondent, who could speak with authority upon the condition of his vehicle, he did not file even an independent counter. He merely adopted that of the insurance company. It was only during the enquiry and that, too, during the cross examination of the last witness of the appellant that the theory of brake-failure was suggested. No doubt R.Ws. 1 and 2 followed P.W. 5 into the witness box and spoke to the latent defect of the vehicle. Having regard to the evidence of the Motor Vehicles Inspector R.W. 2, the theory that the driver had lost control of the vehicle because of the sudden failure of brakes cannot be ruled out. The further question arises whether by merely invoking the suddenness of the brake-failure the owner of the vehicle can be said to have discharged the burden that the law throws upon his shoulders. Where the facts established show that the proper and natural inference arising therefrom is that the injury complained of was caused by the lorry driver's negligence or when the doctrine of *res ipsa loquitur* applies and a presumption of fault is raised against the driver of the lorry and vicariously against the master, the latter, if they are to succeed in their defence, must overcome the inference or the presumption by contrary evidence. The burden on them will be to show how the act complained of could have reasonably happened without negligence on their part. If there was sudden brake-failure and if it was due to a latent defect, which was not ordinarily visible on external inspection, has the driver or his master shown that he had been properly maintaining and inspecting the internal parts of the lorry periodically? One would expect the lorry-owner to have examined some automobile engineer, who had previously inspected the internal parts of the lorry or the engineer who had replaced the internal parts if they had been found to be worn out. The evidence of the Motor Vehicles' Inspector in this case is that the failure of the wheel cylinder might be due to the part being worn out. The evidence of R.W. 1, the driver is that the lorry is of Fargo make of 1950 model. The accident took place in November, 1969, that is to say, nearly 19 years after it had been manufactured. What did the owner of the lorry do during these 19 years? Did he get the internal brake cylinder inspected or replaced at any time by any engineer? Did he ever have the lorry serviced and kept in good repair? These are questions which remained unanswered by the evidence adduced on the side of the respondents — questions which it is the duty of the respondents to answer to the satisfaction of the Court. The lorry is a huge vehicle which has been plying for hire for a long time and the owners of the lorry owe a duty to society to keep such dangerous vehicles in good condition. At any rate, unless, in a case like this, the owner adduces evidence to show that he has taken reasonable care in maintaining the vehicle in good condition and having it inspected periodically for defects, he cannot escape liability.

3. A division Bench of this Court in *Lakshmiammal* v. *State of Tamil Nadu*[1] has held that where it is alleged that there had been a latent defect which the driver of the bus could not know, and the accident was caused as a result of such latent

1. (1974) 87 L.W. 249.

defect resulting in the failure of the brake the respondent can get over liability only if he further shows that the latent defect was not discoverable in spite of reasonable care. I feel bound by this ruling, which, if I may say so with respect, lays down the correct legal position. Learned Counsel for the insurance company Mr. Devanathan, would, however, bring to my notice the ruling of the Privy Council in *Tan Chye Choo* v. *Chong Kew Moi*[1] in support of the proposition that neither the owner nor his driver could be held liable in case of a mechanical break-down due to a latent defect. But that was a case where there was evidence given by the driver of the taxi that the car was inspected at periodical intervals and that there had been no failure to take proper steps to maintain the car. In fact, the trial Judge in that case held that "the respondent had done all that she could be expected to do". This finding of the trial Judge was accepted by the Privy Council and it is on the basis of that acceptance that they exonerated the driver and the owner of the vehicle of any negligence. But in this case there is not a tittle of evidence as to whether the owner of the vehicle periodically had the lorry examined and rectified and kept in good repair. I would, therefore, hold that the respondents have failed to discharge the burden which undoubtedly lies upon them. It would then follow that they cannot be exonerated of the liability to compensate the appellant for the death of her husband.

4. The next question arises, what is the quantum of compensation to be awarded ? The Tribunal has given a finding in this behalf and fixed the compensation at Rs. 10,400. The deceased Munuswamy was 40 years old at the time of accident. He was a packer in a firm of Chemists and druggists drawing a salary of Rs. 100 per mensem. He had no children and his only dependant was his wife, who is the claimant. There was a prospect of his living for another 20 years. The Tribunal was right to hold that he would have spent at least Rs. 50 every month upon his wife. The value of the dependency would then come to Rs. 600 per annum. Taking into account the relevant factors, the compensation may be fixed at Rs. 8,000. The amount will carry interest at 6 per cent. per annum from the date of the claim *i.e.*, 26th November, 1969 upto the date of deposit.

5. The appeal is allowed with costs. Time for payment two months.

R.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam and V. Ramaswami, JJ.*

Karuppanna Thevar (died) and others .. *Appellants**

v.

Rajagopala Thevar and others .. *Respondents.*

Evidence Act (I of 1872), Chapter V—Proof of documents—Public document—Nature of proof to be adduced—Document marked by consent—Effect of consent.

Under section 64 of the Indian Evidence Act, documents must be proved by primary evidence except in the case thereafter mentioned. Primary evidence means the document itself produced for inspection of the Court. One of the exceptions provided to this rule is the one to be found in section 65 clause (*e*) which is to the effect that where the original is a public document within the meaning of section 74, secondary evidence may be given of the existence, condition or contents of the document. When secondary evidence is sought to be admitted it is necessary for the party who produces the secondary evidence to prove that the document is one of those mentioned under section 65 and that, therefore, he is entitled to adduce that secondary evidence. Whether it is the primary evidence of the production of the original document itself or the secondary evidence of a certified copy, the document will have to be proved with reference to the person who executed the document, attestation and the hand-writing of the person by whom it is purported to have been executed

1. (1970) A.C.J. (P.C) 325.

*Appeal No. 390 of 1948. *30th January, 1974.*

under sections 67, 68 and 69. The consent of the party for marking the document only relieves the plaintiff of his obligation to prove that the original is a public document within the meaning of section 74. The consent does not dispense with either the proof of contents of the document or the truth or otherwise of the contents. [*Para.* 6].

Cases referred to:—

P.C. Purushotham v. *Perumal*, (1972) 1 S.C.J. 469 : (1972) 1 M.L.J. (S.C.) 83 : (1972) 1 An.W.R. (S.C.) 83 : (1972) 2 S.C.R. 646 ; *Palaniappa Chettiar* v. *Bombay Life Assurance Co., Ltd.*, (1947) 2 M.L.J. 535 : 60 L.W. 803 : A.I.R. 1948 Mad. 298.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore in Original Suit No. 25 of 1964.

D. Ramaswami Ayyangar and *R. Krishnamachari*, for Appellants.

M.R. Narayanaswami, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—The first defendant is the appellant. The suit was filed by respondents 1 to 4 for partition and separate possession of their 4/5th share in the plaint schedule properties which consisted of two items. The first item is a pucca house bearing door No. 3/135 and comprised in T.S. No. 10/2191 of Kattur village in Coimbatore town. The second item is given as vacant site measuring 51 cents forming part of T.S. No. 1771/1-A and situate in Pankaja Mills Road, Coimbatore. The appellant and respondents 1 to 4 are brothers, the appellant being the eldest. The respondents in their plaint stated that they and the first defendant have been living for a considerable time separately each following his own avocation and calling but they have not divided the joint family properties by metes and bounds. Item 1 in the schedule is the ancestral family house in which the plaintiffs are living separately with their own families in different portions. The first defendant has also retained for his own use a portion of the said item. Item 2 is a vacant site measuring 51 cents situate in Pankaja Mills Road. The first defendant appears to have put up some tiled flimsy structures in some portion of the site. He is residing with his family in a structure in a portion of the site and has rented out the other portions without reference to the plaintiffs and without any right or authority to do so. The plaintiffs claim that they are entitled to vacant possession after removal of the superstructure. On these allegations the plaintiffs sought a decree for partition of their 4/5th share in both the items.

2. In the written statement filed by the appellant herein he stated that in an oral partition some time 30 years ago before 1964, the first defendant became separated and item 1 properties were allotted to the plaintiffs and item 2 which was an unproductive vacant land with a number of sites was allotted to him for his share and that the first defendant was driven out of the family house and thereafter the first defendant had nothing to do with the family or its properties or the income therefrom. He also pleaded that by his own exertions by doing cooly work and a small milk vending business he earned some income and with that he put up the buildings on item 2 which was allotted to his share in the said oral partition. The cost of these constructions was stated in the written statement as Rs. 20,000. The defendant also denied that he retained any portion in the first item for his own use and characterised the assertion in the plaint in regard thereto as a deliberate falsehood and asserted that the plaintiffs alone are in possession and enjoyment of the entire house. The second defendant remained absent and was set *ex parte*.

3. The trial Court came to the conclusion that the first defendant had not proved the oral partition pleaded by him and that, therefore, the plaintiffs are entitled to the partition as prayed for. So far as the superstructures on item 2 are concerned, it was found that the first defendant constructed the same at his own cost and that, therefore, in the final decree proceedings the allotment should be made in such a way so as to make the buildings fail to the share of the first defendant, and if this was not possible a Commissioner will have to be appointed to suggest suitable compensation for the buildings.

4. In this appeal, the learned Counsel for the appellant submitted that the admitted long course of conduct of the parties clearly showed that there should have been an oral partition as contended for by the appellant and that only in assertion of his title as per the oral partition, the appellant could have built all the superstructures. As already stated, the superstructures were built by the appellant and this was admitted by the plaintiffs-respondents even in the plaint. In the oral evidence of P.W. 1 he had stated that the appellant had been in possession of item 2 for more than 20 years, that at that time when he came to originally occupy the site there was no building in item 2 and that later on the first defendant constructed these superstructures from his own income and not from the joint family or other income. Again, the appellant in his written statement had stated that the construction had cost him about Rs. 20,000. A Commissioner was appointed by the lower Court to inspect the property and report as to the nature of the superstructures and their value and he has submitted a report in which he had valued the superstructures at Rs. 17,075. The investment of such a large amount over item 2 by way of construction of buildings in our view leads to the inference that it should have been only on the basis of a claim of ownership to the property which could be only on the basis of the oral partition pleaded by the first defendant. This inference is fortified by the fact that though the plaintiffs were aware of the construction even 20 years before, admittedly they did not make any written objection nor was there any written demand for partition. Of course the first plaintiff would say in his evidence that he orally objected and was orally demanding partition for more than 20 years but the first defendant would not accede to that request. This is hardly believable. If in spite of the objection of the plaintiffs the first defendant was going on constructing buildings and refusing to accede to the request for partition, the plaintiffs would not have kept quiet for all these 20 years. In addition to this we have the house tax receipts produced by the first defendant which are marked as Exhibits B-7, B-8 and B-10. These receipts refer to the building in respect of which the tax is as door Nos. 4/41 to 44. For almost the same period the plaintiffs produced Exhibits A-7 to A-21 which are purported to be tax receipts issued by the Coimbatore Municipality. The property in respect of which that tax was paid is stated in these receipts as door No. 4, Pankaja Mills Road. It is not clear whether door No. 4 relates to the suit item 2. But we have the admission that the tax receipts, Exhibits B-7, B-8 and B-10 relate to the superstructures on item 2. But there is no clear evidence to show that Exhibits A-7 to A-21 relate either to the vacant site in item 2 or to any other property. If they relate to the vacant site on item 2 and if that vacant site is a joint family property as contended by the plaintiffs, then one would have expected that the tax receipts should be either in the name of all the persons or the tax should have been paid by all of them. It is not the case of the plaintiffs that with reference to item 2 the first defendant had at any time either contributed to the plaintiff for payment of the tax evidenced by Exhibits A-7 to A-21 or that they paid the amount including the share of the first defendant. We are, therefore, unable to place any reliance on these Exhibits A-7 to A-21. That leaves us with the other sets of evidence in this case. One set of evidence is the mortgage documents executed by the fourth plaintiff and the third plaintiff. Exhibit A-1, dated 29th January, 1954 was executed by the fourth plaintiff in favour of one Rangammal and this related to the 1/5th share of the fourth plaintiff in item 1. Since this document does not relate to item 2, this does not in any way help the plaintiffs to prove that there was no partition. Exhibit A-2 is a mortgage deed, dated 24th October, 1958 executed by the third plaintiff in favour of one Ayyammal. The property mortgaged is stated to be the 1/5th share of the third plaintiff in items 1 and 2. The curious feature in this case is that neither the third plaintiff nor the mortgage had been produced. The learned Counsel for the appellant argued that both Exhibits A-1 and A-2 are attempts by the plaintiffs to create documents in evidence of title in view of the fact that item 2 had gone up in value subsequent to the oral partition. There is great force in this argument.

These are of the year 1954 and 1958 which are long subsequent to admitted construction of the superstructures over item 2 by the first defendant. Though the plaintiffs would now admit that they have no right over the superstructures, Exhibit A-2 on its terms would include a right over the superstructures as well. Further, these two documents are self-serving documents of the plaintiffs and could not be of any evidentiary value against the first defendant. The next set of documents are land acquisition proceedings which are marked as Exhibits A-4 to A-6. Exhibits A-4 and A-5 are certified copies of two awards and Exhibit A-6 is a notice issued under section 19 of the Land Acquisition Act to the fourth plaintiff. The land acquisition related to a small portion of item 2. It is true that in all these documents there is a reference to the plaintiffs and the first defendant as joint owners of T.S. No. 1771/1-A. It is not clear whether the portion acquired was entirely in item 2 or in any other portion in T.S. No. 1771/1-A. The plaint describes item 2 as part of T.S. No. 1771/1-A. It might be that T.S. No. 1771/1-A included some other portion in which the plaintiff were interestsed. In any case there is no explanation as to how the plaint describes the property as T.S. No. 1771/1-A part and whether the entire land acquired under the land acquisition proceedings formed part of item 2. Even assuming that the property acquired formed part of item 2, it cannot be stated that the award and the notice issued conclusively establish the title of the plaintiffs to a joint ownership of the same. It might be noted that the compensation awarded itself was a sum of Rs. 607 of which the first defendant's share is shown as Rs. 317.05 and the share of each of the plaintiffs is shown as Rs. 80.15. It might be that the defendant considered that it is not worthwhile to fight it especially if the title had been disputed it should have been referred under section 31. It is true the defendant had not come forward with any explanation for not disputing the claim. But it should not be forgotten that the award made by the Land Acquisition Officer treating the property as the joint property cannot be treated to be a binding order relating to the title between the parties, and it is always open to the parties to dispute the question of title in subsequent proceedings. Therefore, Exhibits A-4 to A-6 though of some value are not enough to dislodge the consistent course of conduct which showed that the plaintiffs must have had title to the property.

5. The only other important evidence on which the learned Counsel for the respondents would rely is Exhibit A-3 which is a certified copy of the alleged statement made by the four plaintiffs and the defendant before the Land Acquisition Tahsildar. In this statement of course, there is a reference that suit item 2 is a joint family property belonging to the four plaintiffs and the defendant and that each is entitled to a 1/5th share in the same and so far as the superstructures thereon are concerned, the first defendant alone is entitled to the same. In the certified copy at the end it is stated that the statement was signed by the plaintiffs and the first defendant. But unfortunately for the plaintiff the original statement itself had not been produced. The first defendant in his evidence as D.W. 1 flatly denied having given any such statement and having signed any such statement. On this denial, it was necessary for the plaintiffs to have proved either by calling the Tahsildar who recorded the statement or by producing the original statement or by other means that the first defendant had given such a statement. But he had satisfied himself with filing Exhibit A-3 a certified copy of the alleged statement. The learned Counsel for the respondents relied on the fact that this document was marked by consent on 14th February, 1968. The learned Counsel submitted as a proposition of law that when a document is marked by consent not only there was no further need for a formal proof of the document but also it would amount to proof of whatever the document contains. In support of this contention the learned Counsel relied on the decision of the Supreme Court in *P. C. Purushotham* v. *Perumal*[1]. That was a case in which the point in controversy was as to whether the respondent in that case held four election meetings admitted

1. (1972) 1 S.C.J. 469 : (1972) 1 M.L.J. (S.C.) 83 : (1972) 1 An.W.R. (S.C.) 83 : (1972) 2 S.C.R. 646 : A.I.R. 1972 S.C. 608.

by him in his counter-affidavit in the election petition. It was found that the practice in Pondicherry was that before every meeting the person who wants to hold that meeting will have to apply to the Inspector of Police for permission to hold the meeting mentioning the date, place and time of the meeting. The unsuccessful candidate who filed the election petition marked four applications filed by the respondent for grant of permission for the meetings and the orders made thereon by the Inspector of Police granting such permissions. The Inspector of Police was examined as a witness and he spoke to the factum of filing of those applications and the grant of permission by him. He also stated that when such a permission was given by him, he used to depute a Head-Constable to cover that meeting and report about the same. The reports of the head-constable received with reference to the four meetings were filed as evidence through the Inspector of Police. The Supreme Court relied on these reports as evidencing the holding of the meeting on those particular days. It was argued before the Supreme Court that the reports of the head-constable were inadmissible in evidence on the ground that the head-constable who covered those meetings had not been examined. The Supreme Court pointed out that the reports were marked by consent and, therefore, it is not open to the respondent to object to their admissibility. With reference to the argument that though the reports in question are admissible because of the consent the Court cannot look into the contents of those documents, the Supreme Court observed that once the document is properly admitted the contents of that document are also admitted in evidence though those contents may not be conclusive evidence. It could be seen from the facts that so far as the reports of the head-constable are concerned, the Inspector of Police himself spoke to the fact that he deputed the head-constable to cover the meetings and report about the same. He produced the original reports submitted to him by the head-constable. The Inspector had also spoken to the fact that those reports disclosed that as per the permission granted the meetings were held. It has to be noted that only with reference to the factum of holding the meeting that those reports were relied on by the Supreme Court and not for any of the other statements as to what transpired or what was spoken to in that meeting. Since the reports themselves were filed through the Inspector at whose instance the head-constable covered the meeting, the Supreme Court considered that that would be admissible to prove the holding of the meeting on those days. Even here, the Supreme Court hastened to add that those contents may not be conclusive evidence.

6. In this case the fact in issue is as to whether there was an oral partition sometime 30 years before the filing of the suit. With reference to this fact in issue any fact which is inconsistent with this fact in issue would be a relevant fact. Therefore if the first defendant had made any statement subsequent to the alleged oral partition that the suit item 2 is a joint family property, that would be a relevant fact which has to be proved in any of the modes stated in the Evidence Act. Since this statement is stated to be in writing and given to a particular person, it should be proved as provided in Chapter V of the Evidence Act relating to documentary evidence. Under section 64 documents must be proved by primary evidence effcept in the case thereafter mentioned. Primary evidence is defined to mean the document itself produced for inspection of the Court. One of the exceptions provided to this rule is the one to be found in section 65 clause (*e*) which is to the effect that where the original is a public document within the meaning of section 74, secondary evidence may be given of the existence, condition or contents of the document. When secondary evidence is sought to be admitted it is necessary for the party who produces the secondary evidence to prove that the document is one of those mentioned under section 65 and that, therefore, he is entitled to adduce that secondary evidence. In this case the certified copy of the alleged statement was produced by the plaintiffs. If this has to be admitted in evidence it would have to be shown that the original of the same is a public document within the meaning of section 74. Whether it is the primary evidence of the production

of the original document itself or the secondary evidence of a certified copy, the document will have to be proved with reference to the person who executed the document, attestation and the handwriting of the person by whom it is purported to have been executed under sections 67, 68 and 69. The consent of the party for marking the document only relieves the plaintiff of his obligation to prove that the original is a public document within the meaning of section 74. But still since the document is alleged to have been signed by the first defendant and since that fact is disputed by the first defendant the plaintiff is under an obligation to prove the signature of the first defendant or that the first defendant signed the document as required by section 67. The consent given by a party for marking a document does not dispense with either the proof of contents of the document or the truth or otherwise of the contents. In this connection we may refer to the decision of a Division Bench of this Court reported in *Palaniappa Chettiar* v. *Bombay Life Assurance Company Limited*[1] which considered the effect of marking a document by consent. That was an appeal from a suit filed against an insurance company for payment of an amount insured on the death of the insured. The Insurance Company produced two documents, one was a report given by the Doctor who attended on the deceased at the time of his death and the second was the answers given by the same Doctor for a questionnaire sent by the Insurance Company. These two documents contained some materials as to the ailments of the insured which are of such a nature that if they had been disclosed at the time when the policy was issued the company would not have accepted the proposal. These two documents were marked by consent. The Doctor who issued those certificates was not examined. The question for consideration was whether the contents of the documents could be relied on by the company against the plaintiff. This Court held that permitting a document to be marked by consent only means that the party consenting is willing to waive his right to have the document in question proved, that is the plaintiff was prepared to admit that the documents were what they purported to be namely a certificate given by the Doctor and sent to the defendant and a reply given by the Doctor to the questionnaire sent by the company. But agreeing to the document being marked by consent did not mean that the plaintiff accepted the correctness of every statement made by the Doctor in those two documents. The correctness of the allegations contained in the certificate given by the Doctor and in his reply would have to be proved only in the recognized ways as contained in the Evidence Act. With great respect, we are in entire agreement with this view of the learned Judges. Therefore, the statement in Exhibit A-3 cannot be relied on by the plaintiffs as disproving the oral partition contended for by the first defendant. We are also unable to rely on Exhibit A-3 since it purports to be a statement by five people and signed by all of them. It could not be stated that all of them gave such a statement. It must have been given by one of them and assented to by others if at all But there is no evidence as to who gave that statement and who assented to the same. The Tahsildar who examined the parties would have been in a position to state as to whether the first defendant did give a statement as contained in Exhibit A-3 and as to whether the signature in the original of Exhibit A-3 was that of the first defendant. But he had not been examined. Even the plaintiff in his evidence did not state that the statement contained in Exhibit A-3 is the statement given by the first defendant. He satisfied himself by stating merely that the plaintiffs and the defendants gave a statement to the Tahsildar to the effect that it is a joint family property. In those circumstances, we are unable to place any reliance on Exhibit A-3. We have already noticed that the preponderance of evidence adduced by the first defendant showed that there ought to have been an oral partition and an allotment of item 2 to the first defendant and only thereafter, he could have invested such large sums of money for construction of houses over the same. We therefore hold that the first defendant had established that there was an oral partition about 30 years prior to the suit and in that parti-

1. (1947) 2 M.L.J. 535 : 60 L.W. 803 : A.I.R. 1948 Mad. 298.

tion item 2 was allotted to the first defendant. On this finding no other point arises. The appeal is, therefore, allowed, the judgment and decree of the lower Court are set aside and the suit is dismissed with costs. There will, however, be no order as to costs in this appeal.

R.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

V. Srinivasan .. *Appellant**

v.

Rajalakshmi and others .. *Respondents.*

Motor accident—Accident occurring at 8 *a.m.* —*Insurance of vehicle at* 11 *a.m. on the same day—Insurer whether liable in respect of accident—Terms of the contract to be construed—Insurance held to cover the accident.*

An accident occurred at about 8 A.M. on 6th June, 1969. The victim was killed on the spot. The owner of the vehicle went to the Insurance Company at 9-45 A.M. or 11 A.M. on 6th June, 1969. An Insurance policy was issued for the period beginning from and inclusive of 6th June, 1969 and ending with and inclusive of 5th June, 1970. On the question whether the insurance company was liable in respect of the accident,

Held: If there was any retrospectivity, it was in the terms of the contract itself, because the contract in unambiguous words, covered the risk occurring at any hour on the 6th June, 1969. The Insurance company, by the terms of its own contract, was liable to pay compensation to the claimants. [*Para.* 7.]

Cases referred to :—

In re *: Court-Fees,* I.L.R. 46 Mad. 685 : 45 M.L.J. 557: A.I.R. 1924 Mad. 257 ; *Doe* v. *Spence,* (1805) 6 East 120 :*Sidebotham* v. *Holland,* (1895) 1 Q.B. 378 : *Tomlinson* v. *Bullock,* (1873) 4 Q.B.D. 230 ; *Isaac* v. *Royal Insurance Co.,* (1870) 5 Ex. 296 ; In re *Railway Sleepers Supply Co.,* (1885) 29 Ch.D. 204 ; *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association,* (1891) 1 Q.B. 402 ; *Sheffield Corporation* v. *Sheffield Electric Light Co.,* (1898) 1 Ch. 203 ; *Goldsmiths' Co.* v. *The West Metropolitan Railway,* (1904) 1 K.B. 1 ; *Indian Trade and General Insurance Co.* v. *Bhailal,* A.I.R. 1954 Bom. 148.

Appeal against the award of the Motor Accidents Claims Tribunal (Chief Judge, Court of Small Causes) Madras, dated 18th November, 1970, and made in O.P. No. 482 of 1969.

Veeraraghavan, for Appellant.

Venkateswara Rao, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal filed by the owner of a lorry against the Judgment of the Motor Accidents Claims Tribunal, Madras, awarding as against him a compensation of Rs. 15,300 in respect of the death of one Venkatachala Iyer in a lorry accident, and exonerating the Insurer of all liability. The accident took place at about 8 A.M. on 6th June, 1969 in the Kathivakkam High Road opposite to the Indian Oil Company Depot near Ennore. Venkatachala Iyer was cycling along the north to south road in a southerly direction when lorry No.MDH 4939 belonging to the appellant, coming from the opposite direction, collided with his cycle and ran over him. The victim was killed on the spot. Exhibit P-2 is the sketch drawn by the Inspector of Police, who took over the investigation soon after the accident. It shows that the highway is about 37 feet 6 inches broad, the middle tarred portion being 17 feet and the mud portion on one side being 9 feet wide, and the mud portion, on the other, 11 feet 6 inches. The sketch shows that the collision between the cycle and the lorry took place at a point 5 feet to the west of the eastern edge of the tarred portion. This means that at the time of the accident the lorry had gone beyond the midline of the tarred portion into the wrong side of the road and collided against the cyclist. The evidence of P.W. 4, who is the only eye-witness to the

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*A.A.O. No. 289 of 1971. 30*th November,* 1973.

occurrence, is that as he was standing near a betel stall in Ennore High Road, he found the lorry coming at a high speed from the south and dashing against the front side of the cycle, and that he saw the cyclist falling down and one of the wheels of the lorry running over his back. It is also the case of P.W. 4 that the accident took place after the lorry had proceeded to the wrong side of the road. In fact, his evidence, which is inherently acceptable, is also corroborated by the conduct of R.W. 1, Ekambaram, the driver of the lorry, who, when prosecuted in the criminal Court for rash and negligent driving, pleaded guilty and was convicted. It is idle for him to say from the witness box now that he was not guilty of rashness or negligence. I have little hesitation in agreeing with the Tribunal and holding that the death of the victim was the result of rashness or negligence on the part of the driver of the lorry.

2. The next question that arises for consideration is what is the quantum of compensation payable? The deceased used to peddle textiles by going from house to house and according to P.W. 1, the widow, he used to pay her Rs. 100 every week. The Tribunal did not accept this evidence, as it was evidently exaggerated, but fixed the pecuniary loss to the claimants arising from the death of Venkatachala Iyer at Rs. 100 per mensem. The Tribunal also found that the deceased should have been 55 years at the time of his death and it estimated that he might have lived for another 15 years. Had he lived for 15 years he would have according to the Tribunal paid Rs. 18,000 into the hands of the claimants; and as a lump sum payment was being made the Tribunal made a deduction of 15 per cent. out of this amount and fixed the compensation at Rs. 15,000. I see no reason to interfere with this figure because it cannot be said to be shockingly high.

3. The last question that arises for determination is whether the Co-operative General Insurance Society Limited the insurer of the lorry, is liable? The Tribunal held that it was not because in its view the policy itself was issued some hours after the accident had taken place and without that fact having been disclosed to the Insurance Company. In fact the Tribunal went so far as to say that the owner of the vehicle had obtained a policy by playing fraud upon the Insurance Company. This is a finding which has no relation to the pleadings. Even the Insurance Company did not contend in its counter that the policy was vitiated by any fraud or misrepresentation. In fact the owner of the vehicle lives at Tambaram whereas the accident itself took place near Ennore about 28 miles away from Tambaram. The evidence of R.W. 2 (the son of the owner) is that he went to the Insurance Company Office even at 4-30 P.M. on 5th June, 1969 and offered Rs. 100 odd to a clerk of the company for effecting insurance of the vehicle, that the clerk asked him to come to the office the next day as the manager was not available, that he returned home and went back to the Insurance company at 9-45 A.M. on 6th June, 1969, and that he received Exhibit R-1 the insurance policy on that day. It is also his case that he was not aware of the accident that had taken place at about 8 A.M. that day near Ennore. R.W. 3 the Accountant of the Insurance company denies that R.W. 2 came to the office the previous day and says that he came there only at 11 A.M. on 6th June, 1969, paid Rs. 124 and obtained Exhibit R-3, the certificate of insurance on that occasion. I am unable to believe R.W. 2 when he says that he went to the Insurance Company and tendered the amount even the previous day. I am prepared to assume that he went to the Insurance Company Office at 9-45 A.M. or 11 A.M. on 6th June, 1969. The only question is whether at the time he received the insurance policy he or his father could have been aware of the accident. Admittedly, the lorry had been insured with the same company for the previous year, and the policy for the previous year had expired on 31st May, 1969. It is not as if the owner of the lorry was insuring the lorry for the first time on 6th June, 1969. What he did was to renew the policy which he already held, and not to take out a new policy for the first time. If he had not delayed in the renewal of the policy and had taken care to renew it on 1st June, 1969, there would have been no basis for the present plea of the insurance company. But unfortunately, he delayed

renewal for five days. There is no material to justify the inference that at the time of the renewal on 6th June, 1969, the owner of the vehicle or his son, was aware of the accident. If they were unaware of the accident, they could not have misled the Insurance Company by suppression of a material fact, of which they had no knowledge. Further, the finding of the Tribunal that the policy is vitiated by fraud is based neither upon any plea raised by the Insurance Company nor upon any evidence available. It is an unfair and illegitimate conjecture on the part of the Tribunal. I shall, therefore, proceed to discuss the legal position on the basis that neither the Insurance Company nor the owner of the lorry was aware of the accident at the time Exhibit R-3 the certificate of insurance was issued at 11 A.M. on 6th June, 1969.

4. Exhibit R-1 which is the Insurance Policy issued by the Insurance Company, sets out the terms of the contract between the owner of the vehicle and the insurer. Against the column "Period of Insurance" we find the words "From 6th June, 1969 to 5th June, 1970 (both dates inclusive)." Admittedly, the premium had been paid by the lorry owner for the full period of one year. If the intention of the Insurance Company was to cover the period of one year excluding 6th June, 1970 one would have expected the Insurance Company to mention the period from 7th June, 1969 to 6th June, 1970. On the contrary the Insurance Company has expressly committed itself to liability for any risk from 6th June, 1969 upto 5th June, 1970, making it clear that both the dates were included in the period of cover. If all the 24 hours in the 6th of June, 1969, were intended to be part of the period of cover then the accident which took place at 8 A.M. on 6th June, 1969, would certainly be covered by the policy because 6th June, 1969, would commence from the midnight of 5/6th June, 1969.

5. Learned Counsel for the Insurance Company says that if the company had known that the accident had taken place at 8 A.M. on 6th June, 1969, it would never have entered into this contract. That might be so. But it is not the case of the company that the owner of the vehicle had knowledge of the accident and that the contract had become void by reason of any material misrepresentation or fraud. Both parties to the contract must, therefore, be pinned down to the terms thereof. It is open to the company to have stated that the contract would be effective from 11 A.M. on 6th June, 1969, upto 11 A.M. on 6th June, 1970, in which case it could certainly escape liability for an accident which had taken place a few hours before the conclusion of the contract. In Venkataramaiya's Law Lexicon, "Day" has been defined to be the period from midnight to midnight.

6. While interpreting section 9 of the Indian General Clauses Act (X of 1897) Coutts-Trotter, J., (as he then was), has in In re *Court-Fees*[1], speaking for the Special Bench consisting of three Judges, made certain observations, which are of some guidance in solving the problem before me, and those observations are as follows :—

> "Section 9 enacts that in any Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to". In my opinion, this case is not really affected by the consideration of whether the English Interpretation Act or the Indian General Clauses Act is to be looked to for the guiding rule in this case. The whole argument of Mr. Srinivasa Iyengar is based on the use of the preposition "from" in the notification instead of the more obvious "on". To my mind no useful purpose is served by drawing distinctions between particular prepositions such as "on", "from", "from and after", and so forth and for that I have the authority of *Doe* v. *Spence*[2] and of Lindley, L.J., in *Sidebotham* v. *Holland*[3]. It appears to me that while it is true that no one general rule exists as to the computation of time . . . . the English Common Law

1. I.L.R. 46 Mad. 685 : 45 M.L.J. 557 : A.I.R 1924 Mad. 257.
2. (1805) 6 East 120.
3. (1895) 1 Q.B. 378.

has evolved two perfectly clear principles and they are the principles which I conceive that the draftsman of the Indian General Clauses Act intended to embody in the sections which I have quoted. What I conceive to emerge from the decided cases is this : that as the law in general neglects fractions of a day, you must either exclude or include the whole of the day with which a given statute or rule or regulation deals. And the exclusion or inclusion I think, is clearly provided in two other rules. If you are fixing the point of time at which a certain state of things is to be called into existence, *that state of things comes into existence at midnight of the day preceding the day at which or on which or from which or from and after which the new state of things begins.* In such cases the statute or rule is only concerned in fixing the terminus *a quo* of a new state of law which is enacted to continue indefinitely, in other words, until repealed by a new enactment of the Legislature where, in short, you have a terminus *a quo* but no terminus *ad quem.* This principle is well illustratad by the case of *Tomlinson* v. *Bullock*[1]. It is one of obvious convenience for it would be an intolerable burden upon the litigant public to require it to ascertain at which precise hour of the day a particular statute is passed or a particular rule or regulation is promulgated. The other rule is this. When you have a period delimited by statute or rule which has both a beginning and an end the word "from excludes the opening day and any words fixing the closing day include that day. As was pointed out by Day, J. any other canon of construction would lead to an absurdity. For instance a policy of insurance to be good for one day from 1st January, might be valid only for a few hours or even for a few minutes or conceivably not at all unless you exclude the 1st January from the computation. Illustrations of the application of this principle are to be found in *Isaac* v. *Royal Insurance Company*[2]. In re, *Railway Sleepers Supply Company*[3]; *South Staffordshire Tramways Company* v. *Sickness and Accident Assurance Association*[1] *Sheffield Corporation* v. *Sheffield Electric Light Company*[2] and *Goldsmiths Company* v. *The West Metropolitan Railway*[3]. This distinction appears to me to be vital and reconciles all the cases referred to in the argument. I think the rule that emerges is this : Where a statute fixes only the terminus *a quo* of a state of things which is envisaged as to last indefinitely the common law rule obtains that you ought to neglect fractions of a day and the statute or regulation or order takes effect from the first moment of the day on which it is enacted or passed that is to say from midnight of the day preceding the day on which it is promulgaged : where on the other hand a statute delimits a period marked both by a terminus a *quo* and a terminus *ad quem* the former is to be excluded and the latter to be included in the reckoning."

The observations made by the learned Judge in respect of the commencement date of an Act when the Act uses the word "from" or "from and after", throw some light on how to interpret the commencement date recited in an instrument such as an insurance contract As the insurance contract before me speaks without ambiguity there is no need to make any speculative inference. It is true the contract delimits a period marked both by a terminus *a quo* and a terminus *ad quem* but then it expressly declares that the date from which it would come into effect is included within the period of one year in the same way as the date on which it is to terminate will be included.

7. As has been pointed out by Chagla, C.J. in *Indian Trade and General Insurance Company* v. *Bhailal*[4] in order to decide whether a contract of insurance should apply to a loss which had already taken place the Court must try and gather the intention of the parties and the intention should be gathered primarily from the document itself which is the repository of the terms of the contract. Here even learned Counsel for the Insurance Com-

1. (1879) 4 Q.B.D. 230.
2. (1870) 5 Ex. 296.
3. (1885) 29 Ch.D. 204.

1. (1891) 1 Q.B. 402.
2. (1898) 1 Ch. 203.
3. (1904) 1 K.B. 1.
4. A.I.R. 1954 Bom. 148.

pany does not contend that the contract did not intend to include 6th June, 1969, but what he contends is that if the Company had known that an accident had occurred a few hours earlier at 8 A.M. on that day it would not have agreed to include that date in the period of cover. But then, it is open to him to have attacked the contract as invalid on the ground that it has been the result of collusion or fraud. But no such attack has been made in the counter itself, and there is no evidence in support of such an attack. It is next contended by learned Counsel for the Insurance Company that the contract having been concluded only at 11 A.M. on 6th June, 1969, it would be wrong to hold that it could cover an accident, which had taken place three hours before the conclusion of the contract. I am unable to agree. It was open to the Insurance Company to have stipulated that the contract would come into force only from 11 A.M. on that day. Instead of doing so, the Insurance Company has undertaken to cover any risk for the entirety of the year beginning from *and inclusive of 6th June*, 1969 and ending with and inclusive of 5th June, 1970. By holding that the Insurance Company is liable for the accident, which took place at 8 A.M. on 6th June, 1969, I am not giving any retrospective effect to the contract at all. If there is any retrospectivity, it is in the terms of the contract itself, because the contract, in unambiguous words, covers the risk occurring at any hour on the 6th June, 1969. I, therefore hold that the Insurance Company, by the terms of its own contract, is liable to pay compensation to the claimants.

8. The appeal is consequently allowed and an award is made against both the appellant and the Insurance Company for payment of compensation of Rs. 15,300 to the claimants. There will be no order as to costs. Time for payment two months.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam and N. S. Ramaswami, JJ.*

Khader Khan Sahib .. *Appellant**

v.

Doraiswami Chettiar .. *Respondent.*

Contract Act (IX of 1872), section 70—When attracted—Conditions to be fulfilled.

For invoking section 70 of the Contact Act, the first condition is that a person should lawfully do something for another person or deliver some thing to him; the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously and the third condition is that the person for whom something is done or to whom something is delivered must enjoy the benefit thereof. [*Para.* 4.]

It is to be noted that for the purpose of invoking section 70 of the Contract Act the plaintiff need not have any interest in the payment of the amount. It is only under section 69 the question of a person being interested in the payment of the money which another is bound to pay arises. [*Para.* 6.]

All that the word "lawfully" in section 70 would in the context indicate is that after something is delivered or something is done by one person for another and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which under the provisions of section 70 gives rise to a claim for compensation. [*Para.* 8.]

Held on facts, that the plaintiff was entitled to a decree against the first defendant by virtue of section 70 of the Contract Act. [*Para.* 10.]

Cases referred to :

Mulamchand v. *State of Madhya Pradesh*, (1968) 2 S.C.J. 924 : (1968) 3 S.C.R. 214: A.I.R. 1968 S.C. 1218 : *Muthayya Chetty* v. *Narayanan Chetty*, (1928) M.W.N.

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* L.P.A. No. 75 of 1969. *3rd December*, 1973.

41 : 109 I.C. 101: A.I.R. 1928 Mad. 317; *State of West Bengal* v. *B. K. Mondal*, A.I.R. 1962 S.C. 779; *Changalroya Reddi* v. *Udai Kovour*, 44 L.W. 214: A.I.R. 1936 Mad. 752; *Raja of Pittapur* v. *Secretary of State*, (1914) 25 I.C. 783.

Appeal under clause 15 of the Letters Patent against the decree of the Honourable Mr. Justice Alagiriswamy, dated 5th December, 1968 and passed in S.A. No. 1869 of 1964, preferred to the High Court against the decree of the Court of the Subordinate Judge, Salem in A.S. No. 37 of 1964 (O.S. No. 669 of 1962, D.M.C. Namakkal).

R. Sundaralingam, for Appellant.

P. S. Ramachandran, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—The plaintiff in the suit is the appellant before us. The question that arises in this Letters Patent Appeal is whether the plaintiff is entitled to be compensated by the first defendant under section 70 of the Contract Act. The suit property originally belonged to one Rahamat Bee. She had mortgaged the same to one Abdul Azeez under the deed, dated 5th July, 1946. One Perumal Udayar, a simple money creditor of Rahamat Bee as well as her husband obtained a decree in O.S. No. 520 of 1952 on the file of the Court of the District Munsif, Namakkal and brought the suit property to sale subject to the abovesaid mortgage in favour of Abdul Azeez. In the Court-auction held the first defendant, in the present suit, out of which this Letters Patent Appeal arises, purchased the property (subject to the mortgage in favour of Abdul Azeez, dated 5th July, 1946). The said Abdul Azeez brought a suit on his mortgage in O.S. No. 315 of 1958 on the file of the Court of District Munsif, Namakkal impleading the first defendant herein also as a party defendant, he having purchased the equity of redemption in the Court sale in pursuance of the money decree in O.S. No. 520 of 1952. The defendants 2 to 4 in the present suit, are the children of Rahamat Bee, the original owner of the property and they as well as their father had also been impleaded as party defendants in the mortgage suit filed by Abdul Azeez. By the time the said mortgage suit was filed, an appeal by the judgment-debtor in the money decree (O.S. No. 520 of 1952) had been allowed and the money decree in pursuance of which the first defendant had purchased the property in Court-auction, had been set aside. The plaintiff in the above said money suit (O.S. No. 520 of 1952) had filed a second appeal to this Court in S.A. No. 605 of 1958 and that came to be allowed eventually on 4th February, 1961. But the position when the mortgage suit was filed by Abdul Azeez was, that the decree in the money suit stood set aside. Though the first defendant herein had taken possession of the property in pursuance of the Court-sale in execution of the abovesaid money decree, and he was vitally interested in redeeming the earlier mortgage in favour of Abdul Azeez, he remained *ex parte* in the mortgage suit brought by the said Abdul Azeez. It would appear that the first defendant thought that by the money decree having been set aside, on appeal by the judgment-debtors in O.S. No. 520 of 1952, the Court sale in his (first defendant's) favour would become ineffective.

2. The mortgage suit by Abdul Azeez (O.S. No 315 of 1958), was decreed on 30th September, 1958. There was an execution proceeding in pursuance of the mortgage decree. The Court sale, in pursuance of the abovesaid mortgage suit, was avoided by the plaintiff herein (appellant before us) advancing a sum of Rs. 3,000 on a mortgage of the same property executed by defendants 2 to 4 herein.

The consideration for the mortgage is Rs. 3,000 and the entire sum had gone in discharge of the mortgage of Abdul Azeez.

3. In the present suit on the mortgage for Rs. 3,000 executed by defendants 2 to 4 (Exhibit A-1, dated 30th September, 1959), the plaintiff impleaded the first defendant and claimed relief against him also in respect of the said sum of Rs. 3,000. The plaintiff relied on section 69 as well as section 70 of the Indian Contract Act in order to get relief against the first defendant. The trial Court refused to accept the case of the plaintiff as against the first defendant and dismissed the suit as

far as he was concerned. On appeal by the plaintiff, the first appellate Court allowing the appeal, granted a decree in favour of the plaintiff as against the first defendant also. Against that, the first defendant filed S.A. No. 1869 of 1964 on the file of this Court and Alagiriswami, J., has allowed the second appeal holding that the plaintiff cannot get relief as against the first defendant either by virtue of section 69 or by virtue of section 70 of the Indian Contract Act.

4. In the present appeal, under the Letters Patent, filed by the plaintiff, the contention of Mr. M. Srinivasan, learned Counsel on his behalf is that section 70 of the Contract Act is applicable to the facts of this case and the plaintiff is entitled to a decree as against the first defendant. Section 70 of the Contract Act is in the following terms :

> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered."

As pointed out by the Supreme Court in *Mulamchand* v. *State of Madhya Pradesh*[1], for invoking section 70 of the Indian Contract Act, the first condition is that a person should lawfully do something for another person or deliver some thing to him ; the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously and the third condition is that the person for whom something is done or to whom something is delivered must enjoy the benefit thereof. The question is whether in the present case these conditions are satisfied, for, if they are satisfied, the first defendant is liable to make compensation to the plaintiff.

5. In the present case, what has happened is that even though the equity of redemption had been sold away in the Court-auction held in pursuance of the decree in O.S. No. 520 of 1952 and the first defendant herein as auction-purchaser thereof had become the owner of the equity of redemption, Abdul Azeez, the mortgagee, in his suit on the mortgage impleaded not only the purchaser (the first defendant herein) but also the legal representative of the original mortgagor and the mortgage decree was against all of them. Under the said mortgage decree, not only the first defendant herein (who was the sixth defendant in the mortgage suit) but also defendants 2 to 4 herein who were also party defendants in the said mortgage suit became entitled to redeem the mortgage. As already seen, by the time the mortgage suit was filed by Abdul Azeez, the money decree in O.S. No. 520 of 1952 had been set aside on appeal, and the parties seem to have proceeded on the impression that the Court-auction sale in favour of the first defendant herein which was in pursuance of the money decree was of no avail. Thiat is how the first defendant who was really interested in redeeming the property of the earlier mortgage in favour of Abdul Azeez (subject to which the Court-auction in his favour was held) remained *ex parte* in the mortgage suit and did nothing when execution was levied by Abdul Azeez in pursuance of the mortgage decree ; and defendants 2 to 4 were trying to save the property from being sold in Court-auction. There is no dispute that the plaintiff herein (appellant before us) paid a sum of Rs. 3,000 which admittedly went in discharge of the mortgage decree. But for such discharge of the mortgage decree, the property was liable to be sold in Court-auction and the first defendant herein would certainly have been damnified. Now as the mortgage decree has been discharged, the first defendant is able to enjoy the property free of the encumbrance. It is to be noted that under the Court sale in his favour, he purchased the property only subject to the earlier mortgage in favour of Abdul Azeez and further Abdul Azeez obtained a mortgage decree impleading not only the legal representatives of the original mortgagor but also the first defendant herein. Undoubtedly, the first defendant who is entitled to the property as the Court-auction purchaser in pursuance of the decree in O.S. No. 520 of 1952 and who is in possession of the same, has been benefited by the payment of Rs. 3,000 by the plaintiff which went in discharge

1. (1968) 2 S.C.J. 924 : (1968) 2 S.C.R. 214 : A.I.R. 1968 S.C. 1218 at 1222.

of the mortgage decree of Abdul Azeez, for, the first defendant gets the property free of the encumbrance even though it was he who was bound to discharge the same. It is in this background of facts, one has to see whether the conditions of section 70 of the Contract Act are satisfied or not.

6. The learned Judge who heard the second appeal has given two reasons for holding that the plaintiff is not entitled to relief against the first defendant. One is that the plaintiff cannot be said to be a person interested in paying off the earlier mortgage and therefore he is not entitled to redeem. It is to be noted that for the purpose of invoking section 70 of the Contract Act, the plaintiff need not have any interest in the payment of the mortgage amount. It is only under section 69 of the Contract Act, the question of a person being interested in the payment of the money which another is bound to pay arises. We have already extracted the conditions which should be satisfied for the application of section 70 of the Contract Act. There is nothing in section 70 which warrants the conclusion that the plaintiff should be a person interested in the payment if he is to get relief.

7. The learned Judge has not given a finding against the plaintiff in respect of conditions 2 and 3, namely, that doing the thing should not be gratuitous and that the other person should enjoy the benefits thereof. In other words, the learned Judge has not found that the payment of Rs. 3,000 by the plaintiff was unauthorised or gratuitous or that the first defendant has not enjoyed the benefit of the payment as contemplated under section 70 of the Contract Act. Even in respect of the first of the conditions, namely that a person should lawfully do something for another or deliver something to him, the learned Judge has not found that what the plaintiff did in this case is not lawful within the meaning of section 70. However, the learned Judge has taken the view that as the plaintiff did not directly pay off the mortgage decree but only paid the sum of Rs. 3,000 to defendants 2 to 4 which enabled the latter to discharge the mortgage decree he is not entitled to relief. It is true that the plaintiff obtained a mortgage deed from defendants 2 to 4 for the sum of Rs. 3,000 and it was the latter (defendants 2 to 4) who actually paid off the earlier mortgage decree. But, can it be said that the plaintiff did not do anything to the first defendant as contemplated under section 70 of the Contract Act? The recitals in the mortgage, dated 30th September, 1959 executed by defendants 2 to 4 in favour of the plaintiff herein which is marked as Exhibit A-1 in the case, go to show that a sum of Rs. 400 had been advanced by the plaintiff sometime prior to the execution of the mortgage for the specific purpose of paying towards the mortgage decree and getting an adjournment of the impending Court sale and that the balance namely Rs. 2,600 was paid on the date of the mortgage specifically for discharging the mortgage decree. It is not in dispute that as a matter of fact the said sum of Rs. 400 was paid in partial discharge of the mortgage decree, that the sale was adjourned and that then the sum of Rs. 2,600 was paid in full discharge of the mortgage decree. Even though the plaintiff did not personally pay the said amount for discharging the said mortgage decree, it is quite obvious he did discharge the decree through defendants 2 to 4. We are unable to agree with the view of the learned Judge that because the plaintiff did not personally discharge the mortgage decree but he had done only through defendants 2 to 4, section 70 of the Contract Act is not applicable.

8. Even though the learned Judge has not held that what the plaintiff did was not lawful as contemplated under section 70 of the Contract Act, the learned Counsel for the first defendant-respondent contends so. In *Muthayya Chetti* v. *Narayanan Chetti*[1], it has been held that the meaning of the word 'lawfully' in section 70 is merely '*bona fide*'. In *State of West Bengal* v. *B. K. Mondal*[2], it has been pointed out that all that the word "lawfully" in section 70 would, in the context, indicate is that after something is delivered or something is done by one person for another and that thing

1. (1928) M.W.N. 41 : 109 I.C. 101 : A.I.R. 1928 Mad. 317.
2. (1962) 1 S.C.R. (Supp.) 876 : A.I.R. 1962 S.C. 779.

is accepted and enjoyed by the latter, a lawful relationship is born between the two which under the provisions of section 70 gives rise to a claim for compensation. Therefore, in the present case, if the first defendant has accepted and enjoyed the benefit of the payment of Rs. 3,000 towards the discharge of the earlier mortgage, what the plaintiff did would come within the term "lawfully" under section 70. However, the learned Counsel for the first defendant contends that it cannot be said that his client is a person who enjoyed the benefit of the payment as contemplated under section 70, because there is nothing to show that the first defendant voluntarily accepted the benefit. The learned Counsel relies on the observations of the Supreme Court in the above case at page 897 which are as follows :

"There is no doubt that the thing delivered or done must not be delivered or done fraudulently or dishonestly nor must it be delivered or done gratuitously. Section 70 is not intended to entertain claim for compensation made by persons who officiously interfere with the affairs of another or who impose on others services not desired by them. Section 70 deals with a case where a person does a thing for another not intending to act gratuitously and the other enjoys it. It is thus clear that when a thing is delivered or done by one person it must be open to the other person to reject it. Therfore, the acceptance and enjoyment of the thing delivered or done which is the basis for the claim for compensation under section 70 must be voluntary'.

The learned Counsel placed reliance on the last sentence in the above passage and contended that in the present case there was no option for the first defendant not to accept the benefit (of the payment of Rs. 3,000 in discharge of the mortgage decree) and therefore there is no voluntary acceptance of the benefit. We are, however, unable to agree with this contention. As pointed out by the Supreme Court in the above case immediately after the passage quoted above, the requirement mentioned in the passage affords a sufficient and effective safeguard against spurious claims based on unauthorised acts. In that case, it was pointed out that if the act done by the respondent before the Supreme Court was unauthorised and spurious, the appellant could have easily refused to accept the said act and then the respondent would not have been able to make a claim for compensation. It was in that context the above quoted observation had been made.

9. In *Changalroya Reddi* v. *Udai Kovour*[1] a Bench of this Court had to consider the question whether under circumstances similar to the present case there was voluntary acceptance of the benefit. That was a case where the plaintiff owned certain rent-free villages situate in a Zamindari. Some of the defendants in the suit owned other villages in the Zamindari. For arrears of revenue all the villages were brought to sale by the Government. The plaintiff paid the money due to the Government and saved the villages from being sold. The plaintiff claimed reimbursement from the owners of the other villages under section 70 of the Contract Act. One of the contentions was, as the plaintiff in that suit was herself the owner of some of the villages the payment made by her to the Government was for her own benefit and therefore, neither section 69 nor section 70 of the Contract Act would be applicable. The contention was repelled but we are not concerned with that aspect at the moment. The further contention in that case was that the defendants who owned some of the other villages had no option either to accept or reject the benefit of the plaintiff's paying the money to the Government and therefore section 70 has no application, In rejecting this contention at page 760, Varadachariar, J. observed :

"Even if the question of option to accept the benefit of the act be considered material, defendant-2 has undoubtedly accepted the benefit in this case. As pointed out by Sankaran Nair, J. in (*Raja of Pittapur* v. *Secretary of State*[2], if a person uses property which but for another's act would not have existed or had been available to him, he consciously accepts the benefit of the other's act and must pay for it. .... It

1. 44 L.W. 214 : A.I.R. 1936 Mad. 752,
2. (1914) 25 I.C. 783 at 789.

is not defendant 2's case that he does not want the property at the cost of paying the plaintiff the expenses incurred in saving it."

This decision directly applies to the present case, for, here also, but for the plaintiff's act, the property itself would not have existed as it would have been sold in Court-auction in pursuance of the mortgage decree obtained by Abdul Azeez. We are of the opinion that the observations in *State of West Bengal* v. *B. K. Mondal*[1] relied on by the learned Counsel for the first defendant do not in any way run counter to the above passage.

10. Therefore we hold that under section 70 of the Contract Act, the plaintiff is entitled to proceed against the first defendant.

11. The learned Counsel for the plaintiff further contended that defendants 2 to 4 are persons interested in the payment as contemplated under section 69 of the Contract Act, inasmuch as the mortgage decree was against not only the first defendant but also against them, that by paying off the mortgage decree, they are entitled to get reimbursement from the first defendant under section 69 and that the plaintiff having made all of them parties in this suit, the Court would be justified in passing a decree in favour of the plaintiff as against the first defendant also. It is contended that in this way, section 69 of the Contract Act can also be relied on by the plaintiff. However, as we hold that the plaintiff is entitled to a decree against the first defendant by virtue of section 70 of the Contract Act, the further point argued by the learned Counsel for the plaintiff need not be pursued.

12. The result is the Letters Patent Appeal is allowed and the decree of the first appellate Court is restored. There will be no order as to costs.

V.K. *Appeal allowed.*

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1. (1962) 1 S.C.R. (Supp.) 876 : A.I.R. 1962 S.C. 779.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—*P. S. Kailasam* and *S. Maharajan JJ.*

Hussain Uduman .. *Appellant**

v.

Venkatachala Mudaliar and others .. *Respondents.*

Hindu Succession Act (XXX of 1956), *section* 14 (1) *and* (2)—"*Possessed*"—*Meaning of—Property got by a female under razinama decree—Whether enlarged.*

Before applying section 14 (2) of the Hindu Succession Act, the proper question to ask is : does the instrument or decree *prescribe* a restricted estate in the property or does it merely acknowledge and recognise (and not prescribe) a pre-existing estate upon which the Hindu law had imposed a restriction, because the holder of the estate was a woman ? [*Para.* 7.]

The document, instrument, decree or award may, in certain cases, of its own force, create a restricted estate in property and may in certain other cases only re-state the restricted estate which the female Hindu possessed even prior to the date of the instrument, decree or award. If before the date of the deed or the decree, she had no interest in the property and her only source of title is the deed or the decree, which confers upon her a restricted estate, section 14 (2) will apply, and such a restricted estate will not be enlarged into an absolute estate under section 14 (1). If, on the other hand, the source of her title is independent of the instrument or decree and she held a restricted estate even prior to the date of the instrument or the decree, and all that the instrument or decree does is merely to recognise the pre-existing restricted estate of the female Hindu, then sub-section (1) of section 14 would certainly operate upon that restricted estate and expand it into an absolute one. [*Para.* 7.]

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* L.P.A. No. 34 of 1971. *7th March,* 1974.

The operation of the Act is confined only to property in the possession of a female when the Act came into force. [*Para.* 10.]

In the instant case, as the lady was not in possession of the property on the relevant date, it was held that her restricted estate would not become enlarged into an absolute estate. [*Para.* 11.]

Cases referred to :—

Badri Pershad v. *Kanso Devi*, (1970) 2 S.C.J. 114 : (1970) 2 S.C.R. 95: A.I.R. 1970 S.C. 1963; *Gummalapura Taggina Matada Kotturuswami* v. *Setra Veerayya*, (1959) 1 S.C.R. (Supp.) 968 : 1959 S.C.J. 437 : (1959) 1 An. W.R. (S.C.) 158 : (1959) 1 M.L.J. (S.C.) 158 : A.I.R. 1959 S.C. 577; *Gostha Behari* v. *Haridas*, A.I.R. 1967 Cal. 671.

Appeal under clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice V. Ramaswami, dated 30th June, 1971 and passed in S.A. No. 215 of 1968 preferred to this Court against the decree of the Court of the Additional Subordinate Judge, Tirunelveli, dated 18th November, 1967 and passed in A.S. No. 283 of 1966. (Court of the District Munsif, Tirunelveli in O.S. No. 761 of 1964).

S. K. Ahmed Meeran and *A. Abdul Hadi*, for Appellant.

V. Ratnam, R. Srinivasan and *A. Varadarajan*, for Respondents.

The Judgment of the Court was delivered by

Maharajan, J.—This Letters Patent Appeal which is directed against the second appellate judgment of V. Ramaswami, J., arises under the following circumstances :

Survey No. 60/1, which is the subject-matter of this appeal, and certain other properties originally belonged to two brothers, Viswanatha Chettiar and Palaniandi Chettiar. Viswanatha Chettiar, died on 18th February, 1918. Some time before his death, he executed a partition deed and a will, whereby he bequeathed the suit property and other properties to his wife, Gomathi Ammal. After his death, disputes arose between Gomathi Ammal and Palaniandi Chettiar. Thereupon, Gomathi Ammal instituted two suits in the District Munsif's Court, Tirunelveli for enforcement of the partition deed and the will and for direction to register the same. On 6th November, 1920 under Exhibit A-1 both the suits were compromised by the parties, and a decree was granted in terms thereof. Under the terms of the decree, Gomathi Ammal was to enjoy the suit property and certain other properties for life and after her death, these properties were to go to Palaniandi Chettiar and his heirs. One Velayutham Pillai and Ramiah Pillai obtained a decree against Palaniandi Chettiar in S.C. No. 564 of 1934 and in execution thereof brought to sale the vested remainder that Palaniandi Chettiar had in the suit property, purchased the same and obtained symbolic delivery of possession. The plaintiff purchased this right from the Court-auction purchaser on 29th November, 1954. Gomathi Ammal herself died on 8th August, 1964. According to the plaintiff, on her death, he, as the holder of the vested remainder, became entitled to the suit property. The plaintiff's case was that by some arrangement with Gomathi Ammal, the father of defendants 1 to 12 got possession of item 1 (Survey No. 60/1) and was in enjoyment of the same till his death, and after his death, his heirs (defendants 1 to 12) have been in possession of item 1. Defendants 1 to 12, when called upon by the plaintiffs to surrender possession, refused to do so. Consequently, the plaintiff filed the suit for recovery of possession.

2. Defendants 1 to 12, who were the children of Mohammad Hanifa Tharaganar, contended that as per the compromise decree, Gomathi Ammal was given Survey No. 30/3 and S. No. 70/6, that she was in enjoyment of those items, but by mistake the survey number of item 1 was wrongly mentioned in the compromise decree as Survey No. 60/1 instead of as Survey No. 30/3 and this mistake was reiterated in the subsequent documents. Likewise, what was sold in execution of the decree against Palaniandi Chettiar was also wrongly described as Survey No. 60/1 and therefore, the plaintiff had no right in respect of item 1 of the plaint schedule. These defendants also pleaded that they had been in possession of Survey No. 60/1 and

that in any case they have prescribed title to the property by adverse possession.

3. The trial Court held that the survey number had been wrongly given in the compromise decree as Survey No. 60/1 instead of as Survey No. 30/3, that Palaniandi Chettiar sold Survey No. 60/1 to the predecessor-in-interest of the defendants and that, therfore, the plaintiff was disentitled to recover possession of item 1. Consequently it dismissed the suit of the plaintiff in respect of item 1.

4. On appeal by the plaintiff, the Subordinate Judge, Tirunelveli, held that there was no mistake in the description of the survey number in the compromise decree or in the subsequent documents, and on this view, decreed the suit as prayed for in respect of item 1 as well.

5. Against this judgment, the third defendant preferred second Appeal No. 215 of 1968. The learned Judge confirmed the finding of the first appellate Court that there was no mistake in respect of item 1 in the compromise decree and the subsequent documents. This is a finding of fact, which is binding upon us. The learned Judge also held upon a construction of the compromise decree that Gomathi Ammal was given the interest in item 1 only in lieu of maintenance, and that this interest did not get enlarged under section 14 (1) of the Hindu Succession Act. Consequently, the learned Second Appellate Judge dismissed the appeal with costs, and granted leave.

6. The main question that arises for consideration is whether the interest, which Gomathi Ammal got under Exhibit A-1, the razinama decree dated 6th November, 1920 became enlarged into an absolute estate under sub-section (1) of section 14 of the Hindu Succession Act, 1956. The learned Judge held that at the time of the compromise, Gomathi Ammal had only a right to maintenance, and not any pre-existing right to the suit property, that in lieu of maintenance, she was allotted the disputed property for the duration of her lifetime, that consequently section 14 (2) of the Hindu Succession Act applied, and that there could be no enlargement of her interest into an absolute estate under section 14 (1) of the Hindu Succession Act.

7. Section 14 of the Hindu Succession Act reads as follows :—

"(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.—In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

A perusal of the section makes it clear that section 14 (1) governs all kinds of estate "*acquired*" by a female Hindu before or after the commencement of the Act, whether by way of inheritance or devise or at a partition or in lieu of maintenance or arrears of maintenance, or by gift from any person or by her own skill or exertion or by purchase or by prescription or in any other manner whatsoever, or by way of *stridhana* immediately before the commencement of his Act. On the other hand, sub-section (2) of section 14, which is in the nature of an exception to sub-section (1) provides that nothing contained in sub-section (1) shall apply to any property acquired by a female Hindu by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award, where the terms of the gift, will or other instrument or the decree or order or award "*prescribe*" a restricted estate in such property. In other words, the intention of the Legislature was to remove the

disability imposed on women by Hindu law on the ground of sex, but not to interfere with the sanctity of contracts and grants, whereby only a restrictive estate had been deliberately conferred upon them. Sub-section (1) removes the restriction imposed by Hindu Law, on the ground of sex, upon the estate held by a woman and enlarges it into an absolute estate. On the other hand, sub-section (2) leaves intact the restriction on the estate of a woman, not imposed by law on account of her sex, but prscribed by the terms of a contract or grant. Some difficulty may arise in the application of sub-section (2) of section 14 to the facts of a given case. The document, instrument, decree or award may, in certain cases, of its own force, create a restricted estate in property and may in certain other cases only re-state the restricted estate which the female Hindu possessed even prior to the date of the instrument, decree or award. Before applying sub-section (2), the proper question to ask is, does the instrument or decree " prescribe" a restricted estate in the property, or does it merely acknowledge and recognise (and not prescribe) a pre-existing estate upon which the Hindu law had imposed a restriction, because the holder of the estate was a woman ? If before the date of the deed or the decree, she had no interest in the property and her only source of title is the deed or the decree, which confers upon her a restricted estate, sub-section (2) of section 14 of the Act will apply, and such a restricted estate will not be enlarged into an absolute estate under sub-section (1) of section 14. If, on the other hand, the source of her title is independent of the instrument or decree and she held a restricted estate even prior to the date of the instrument or the decree, and all that the instrument or decree does is merely to recognise the pre-existing restricted estate of the female Hindu then sub-ssection (1) of section 14 would certainly operate upon the restricted estate and expand it into an absolute one. The Supreme Court in *Badri Pershad v. Kanso Devi*[1] has observed as follows :—

" Sub-section (2) of section 14 is more in the nature of a proviso or an exception to sub-section (1). It can come into operation only if acquisition in any of the methods indicated therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property."

8. We shall next examine, whether on the date of Exhibit A-1 Gomathi Ammal had a pre-existing title to the suit property. If she had, then the compromise decree merely recognised the estate which she had already acquired and did not create for the first time a restricted estate in the property. In order to understand what she actually got under the compromise, it is necessary to set forth a few facts : Gomathi Ammal was the wife of Viswanatha Chettiar, who died on 18th February, 1918 leaving him surviving his widow Gomathi Ammal and his younger brother, Palaniandi Chettiar. A few days prior to his death that is to say on 13th February, 1918 Viswanatha Chettiar executed a partition deed, whereby he purported to become divided from Palaniandi Chettiar. On the same day, he executed a will whereby he bequeathed Survey No. 60 (1), the property now in dispute and some other items in favour of Gomathi Ammal. Gomathi Ammal proceeded to enforce her rights under the partition and under the testament of her husband by instituting two suits, O.S. No.264 of 1920 and 286 of 1920 on the file of the District Munsif's Court, Tirunelveli, aginst Palaniandi Chettiar. Palaniandi Chettiar contested both these suits. But ultimately on 6th November, 1920 Gomathi Ammal and Palaniandi Chettiar entered into a compromise which was recorded by the Court and embodied in a decree as per Exhibit A-1. The terms of the razinama decree showed that out of the several items of properties dealt with by Viswanatha Chettiar under the partition deed and the will the first schedule property (which comprises of S. No. 60 /1 and S. No. 70/6) and the second schedule property (comprising of a house in Kokkarakulam) were allotted to Gomathi Ammal for her maintenance to be enjoyed by her for life. It was further provided that after the life time of Gomathi Ammal, Palaniandi and

1. (1970) 2 S.C.J. 114 : (1970) 2 S.C.R. 95: A.I.R. 1970 S.C. 1963 at 1966.

his heirs should become absolutely entitled to the said properties. It was also provided that Gomathi Ammal, should not alienate the said items during her lifetime. With reference to the other properties mentioned in the partition deed and will of Viswanatha Chettiar, the compromise recites that the plaintiff relinquished the interest that she had been claiming thereunder and that Palaniandi Chettiar should enjoy the same absolutely. One important clause in the compromise deed is as follows :

> " As the matter has been settled in accordance with the terms mentioned above it has been decided not to register the partition deed and the will propounded by Gomathi Ammal."

9. It may be noted that in the suits filed by Gomathi Ammal, one of the prayers was that these deeds should be directed to be registered. In view of the compromise, however, it was decided that this relief need not be granted. It is significant that neither the partition deed nor the will was characterised in the partition deed as spurious or concocted. In paragraph 4 of the plaint in this suit the following admissions have been made by the plaintiff :

> " A few days before his death, the said P.K. Viswanathan Chettiar had executed a partition deed effecting division between himself and his younger brother and also a will in respect of his properties. But he died even before the documents could be registered. After his death, disputes arose between his widow Gomathi Ammal and his brother Palaniandi Chettiar in regard to the registration of the said two documents. The registering authorities having refused to register the documents Gomathi Ammal filed two suits O.S. No. 264 of 1920 and O.S. No. 286 of 1920, respectively both on the file of the Additional District Munsif's Court, Tirunelveli, for a declaration that the will and the partition deed respectively were duly executed by her husband and for ordering registration of the documents. "

10. It is therefore, clear on the plaintiff's own showing that before the compromise was entered into Gomathi Ammal claimed rights to the suit property and other properties of her husband and traced her title to the partition deed and the will of her husband. It is not as if she merely claimed a right to maintenance and a right to property was conferred upon her for the first time under the compromise deed in lieu of maintenance. The deed of compromise recognised or acknowledged the pre-existing right of Gomathi Ammal, which she had already acquired under the testament and the partition deed, the execution of which has been admitted by the plaintiff in the plaint itself. It appears that these admissions were not brought to the notice of the learned Second Appellate Judge. In the light of these admissions, we have no option but to disagree with the learned Second Appellate Judge and hold that Exhibit A-1 is not a document, which by its own force and independently of any pre-existing right of Gomathi Ammal, created or prescribed any restricted estate in her favour. What she possessed before the date of the compromise was not a mere right to maintenance, but an interest in the suit property and certain other properties. Under the compromise, the pre-existing right to property was recognised. It would then follow that the compromise decree would fall under section 14 (1) of the Act. But, before giving Gomathi Ammal, the benefit of section 14 (1) of the Act, we must be satisfied that she possessed the suit property as a limited owner on 17th June, 1956 the date on which the Hindu Succession Act came into force. The expression "*possessed*" in the initial part of section 14 (1) appears to have been deliberately used by the Legislature. The object of the Act was to confer a benefit on Hindu females by enlarging their limited estate in property into an absolute estate with retrospective effect, provided they were in possession of the property when the Act came into force, and, therefore, in a position to take advantage of this beneficial provision. In *Gummalapura Taggina Matada Kotturuswami* v. *Setra Veerayya*[1], the Supreme Court

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1. 1959 S.C.J. 437 : (1959) 1 An.W.R. (S.C.) 158 : (1959) 1 M.L.J. (S.C.) 158 : 1959 1 S.C.R. (Supp.) 968 : A.I.R. 1959 S.C. 577.

approved the view taken by the Calcutta High Court in *Gostha Behari* v. *Haridas*[1] and held that the opening words of section 14, *i.e.*, "property possessed by a female Hindu", obviously mean that to come within the purview of the section, the property must be in the possession of the female concerned at the date of the commencement of the Act. The Act was not intended to benefit persons who on the relevant date had already purchased property from a female limited owner. There is abundant authority for the proposition that the operation of the Act is confined to property in the possession of the female when the Act came into force. In the language of the Supreme Court in *Badri Pershad* v. *Kanso Devi*[2].

> "The critical words in sub-section (1) are 'possessed' and 'acquired'. The word 'possession' has been used in its widest connotation and it may either be actual or constructive or in any form recognised by law."

11. It is, therefore, necessary for the appellant to make out that Gomathi Ammal was on the date of the Act in physical or constructive possession of Survey No. 60/1. The appellant, who was the third defendant in the trial Court, adopted the written statement of the first defendant, in which it was alleged that Gomathi Ammal was not given Survey No. 60/1 under the compromise decree set out in the plaint, that what was really given to her was Survey No. 30/3 and another property, that Gomathi Ammal was in enjoyment of Survey No. 30/3 and the other property right from the date of the said compromise, and that she never had possession of Survey No. 60/1, which is item 1 of plaint schedule. It is also found from the evidence of P.W. 2 that sometime in 1932 Survey No. 60/1 was transferred from the patta No. 557 of Gomathi Ammal to the Patta No. 116 of Shahul Hameed and others (plaintiff's predecessors - in - title). Certain kist receipts were also produced before the trial Court to show that no payment of kist was ever made by Gomathi Ammal for Survey No. 60/1 after 1932. In fact, Gomathi Ammal herself had executed a will under Exhibit B-5, dated 24th May, 1964 whereby she bequeathed, not Survey No. 60/1, but Survey No. 30/3, in favour of her sister and her sister's daughter. The consciousness behind this testament is consistent with her having lost possession of Survey No. 60/1 several decades earlier and with her having been in possession only of Survey No. 30/3. It would, therefore, follow that on the date the Act came into force, she was certainly not in physical or constructive possession of Survey No. 60/1. In fact in the trial Court, the case of the defendants was that what was allotted to Gomathi Ammal was only Survey No. 30/3 and not Survey No. 60/1, the Survey No. 60/1 mentioned in Exhibit A-1, the razinama decree was a mistake for S. No. 30/3, and throughout Gomathi Ammal had been in possession of only Survey No. 30/3. The trial Court accepted this case and went so far as to direct rectification of this mistake, forgetting that at the time it directed rectification (1966), a third party namely the plaintiff's predecessor had already acquired the vested remainder in Survey No. 60/1 under a Court sale on the basis that under the razinama, it was only a life interest in Survey No. 30/3 that was allotted to Gomathi Ammal, and the vested remainder therein was held by Palaniandi Chettiar. No doubt, the rectification ordered by the trial Court was set aside, both by the first Appellate Court and the second Appellate Court on certain grounds into which we need not enter. The resulting position is that Gomathi Ammal was not at the time the Act came into force, in possession of Survey No. 60/1 even according to the defendants, and the evidence is conclusive that she was not in possession of Survey No. 60/1 on the relevant date. It would, therefore, follow that Gomathi Ammal could not get the benefit of sub-section (1) of section 14 of the Act. It is unnecessary for us to consider whether she could have acquired absolute title to Survey No. 30/3. The subject-matter of dispute in this Letters Patent Appeal is only Survey No. 60/1 and not Survey No. 30/3. The third defendant has failed to make out that Gomathi Ammal was in possession of Survey No. 60/1 on the relevant date,

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1. A.I.R. 1967 Cal. 671.
2. (1970) 2 S.C.J. 114 : (1970) 2 S.C.R. 95 : A.I.R. 1970 S.C. 1963 at 1965.

and that consequently under section 14 (1) of the Act, her restricted estate became enlarged into an absolute estate.

12. We, therefore, confirm the judgment of the second appellate Court, though on different grounds, and dismiss this appeal. There will be no order as to costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Madras Motor and General Insurance Company Limited, Madras .. *Appellant*[*]

v.

A. V. Subramanian and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 95 (1) *and* (2)—*Liability of Insurance Company for damages to third party's property—Jurisdiction of civil Court.*

Section 95 of the Motor Vehicles Act does not bar the civil Court's right to go into the question of claim made by a third party as regards loss to his property caused by a motor accident. [*Para.* 6.]

The Insurance Company is liable to answer the claim of the third party in respect of damages caused to his property. [*Para.* 6.]

Appeal against the Decree of the Court of the District Judge, Coimbatore (East) Erode, in Appeal Suit No. 20 of 1970 preferred against the decree of the Court of the Principal Subordinate Judge of Erode, in Original Suit No. 141 of 1966.

K. C. Srinivasan, for Appellant.

T. R. Venkataraman, for Respondents.

The Court delivered the following:

JUDGMENT.—Second defendant, Madras Motor and General Insurance Company Limited, is the appellant. The suit is for damages claiming Rs. 6,176.54 and for costs. Out of this amount of Rs. 6,176.54 a sum of Rs. 3,956.54 was claimed towards the costs of repair as per the bills from T.V.S. & Sons (Private) Limited and Rs. 2,220 towards loss of income owing to the fact that the taxi was not put on road due to the accident for a period of 74 days.

2. This claim is due to the fact that the lorry MDJ 4632 belonging to the 1st defendant in the suit was driven rashly and negligently resulting in a collision with the taxi belonging to the plaintiffs and caused damages to the taxi.

3. The 1st defendant contended that the lorry was not driven rashly and negligently and that the driver of the lorry accepted the guilt becuse of inducement by the police. The 1st defendant further averred that the damages claimed are excessive and that the damages for non-user is not maintainable. The 2nd defendant Insurance Company has put forward that the suit claim is false and that the clair in any event is excessive. The Insurance Company also pleaded that the taxi was old and many parts were removed and the claim for non-user of the taxi is not maintainable.

4. The trial Court after elaborately discussing the oral and documentary evidence in this case found that the driver of the lorry MDJ 4632 was negligent and the accident was caused due to rash and negligent driving of the driver of the lorry. It also found that the claim for repairs of the taxi and also damages for non-user of the taxi are proved and on that basis decreed the suit *in toto.* Aggrieved by the decision of the trial Court the 2nd defendant preferred on appeal to the District Judge, Coimbatore (East). The lower appellate Court after elaborately discussing the evidence on record and adverting to the relevant facts of the case came to the conclusion that the driver of the lorry was rash and negligent and as a result the accident occurred. The lower appellate Court also held that the sum of Rs. 3,956.54 spent for the purpose of repair by T.V.S. & Sons (Private) Limited is correct. But as regards the damages for non-user of the taxi due to the accident the lower Court instead of Rs. 2,220 claimed by the plaintiffs awarded only

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*S.A. No. 53 of 1971 and Memo. of Cross objections. *14th March,* 1974.

Rs. 1,005 at the rate of Rs. 15 per day for 67 days only. Aggrieved by the decision of the lower appellate Court the 2nd defendant has preferred the above second appeal. Aggrieved by the reduction of the damages as regards non-user of the taxi, the plaintiffs have preferred the cross-objections herein.

5. Thiru Srinivasan, the learned Counsel for the appellant submitted that the Insurance Company cannot be made liable for the damages caused to the taxi insamuch as there is no privity of contract between the Insurance Company and the plaintiffs. This contention was not put forward by the appellant before the trial Court. On the other hand, the appellant as 2nd defendant participated in the proceedings and vehemently opposed the claim of the plaintiffs. Therefore, I do not think it is open to the appellant to put forward the contention as if he is not liable to pay damages as there is no privity of contract between him and the plaintiffs in the suit. I do not find any provision of law debarring the plaintiffs from claiming damages both against the owner and the driver of the lorry and also the Insurance Company with which the lorry has been insured.

6. Section 95 (1) (*b*) (i) of the Motor Vehicles Act states that in order to comply with the requirements of that Chapter a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of the death of or bodily injury to any persons or damages to any property of a third party caused by or arising out of the use of the vehicle in a public place. Thus it is clear that the Insurance Company is liable to answer the claims of the third party in respect of damages caused to a third party's property also. No doubt the provision referred to above is in relation to the claim that has to be settled by the Claims Tribunal constituted under the Motor Vehicles Act. But by this enactment the civil Court's right to go into the question of claim made by a third party as regards loss to his property is not barred. If that be the case, the Civil Court has jurisdiction to entertain such claims. Hence the Courts below are correct in awarding damages to the plaintiffs as regards the costs incurred in repairing the taxi.

7. The plaintiffs have preferred cross-objections as regards the sum of Rs. 1,215 disallowed by the lower appellate Court under the head loss incurred by the plaintiffs by non-user of the taxi. The trial Court after discussion accepted the loss at the rate of Rs. 30 per day for 74 days. The lower appellate Court fixed the amount at Rs. 15 for 67 days only. The evidence on record clearly establishes that the net income of the taxi is Rs. 30 per day and the taxi was in the workshop for 74 days. P.W. 9 gives evidence to this effect. On the other hand, D.Ws. 1 and 2 neither contradicted this evidence nor adduced any evidence as regards the net income of the taxi per day. In the absence of such evidence by the defendants the trial Court correctly accepted the evidence of the plaintiffs and decreed the suit on this account as prayed for. But the lower appellate Court even though it had discussed the evidence on record on this head reduced the net income to Rs. 15 per day without any data or proper discussion. This in my opinion is arbitrary and runs contra to the evidence on record. Hence in my view a sum of Rs. 30 per day as net income for a taxi cannot be considered to be excessive and the net income of Rs. 30 per day for a period of 74 days has to be granted to the plaintiffs as claimed.

8. In these circumstances, the second appeal is dismissed. No costs. The cross-objections are allowed. With the result, the judgment and decree of the trial Court are confirmed. No order as to costs. No leave.

R.S. *Appeal dismissed; Cross-objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

Madras Motor and General Insurance Company Limited, Madras .. *Appellant**

v.

G. Murthi and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 110 *—Amending Act LVI of* 1969*—Motor Accident—Jurisdiction of Tribunal—Compensation also in respect of damage to property—Loss of one eye permanently—Workmen's Compensation Act, Part II of Schedule I, item* 25*—Loss of earning capacity—Assessment of compensation.*

Under section 110 of the Motor Vehicles Act, after it was amended by Act LVI of 1969, the Tribunal has got jurisdiction to award compensation in respect of damages to any property also. [*Para.* 3.]

Under item 25 of Part II of Schedule I to the Workmen's Compensation Act, the loss of earning capacity consequent on loss of one eye without complication has been fixed at 40 per cent. [*Para.* 4.]

In the instant case, it was held that the workman who lost one of his two eyes would suffer thereby 40 per cent loss in his earning capacity. [*Para.* 4.]

Appeals against the order of the Motor Accidents Claims Tribunal, Madras, dated 22nd February, 1972 and made in O.P. No. 113 of 1971.

A. Devanathan, for Appellant.

G. Venkateswara Rao, for Respondents.

The Court delivered the following

JUDGMENT.—These two appeals are directed against the order of the Motor Accident Claims Tribunal, Madras, awarding a sum of Rs. 6,000 by way of compensation for the injuries suffered by one G. Murthy in a traffic accident. On 7th December, 1970 at about 8-50 P.M. as Murthy was cycling along the Mount Road in the northerly direction, he was knocked down by a private bus MDY 4954 belonging to Kuppuswamy Mudaliar, the first respondent, and insured with the second respondent, Madras Motors and General Insurance Company Limited. The bus was being driven in the opposite direction by R.W. 1, Madanagopalaraju. Exhibit P-3 the rough sketch drawn immediately after the accident by the Police shows that the Mount Road is 60 ft. broad at the scene of the accident and that the impact between the bus and the cycle took place 5 ft. to the west of the middle line of the road. According to R.W. 1, while overtaking a stationary bus on the eastern side of the Mount Road, the accident must have happened. The evidence of P.W. 3, the victim of the accident, is that the bus was being driven at a terriffic speed and that it came to the wrong side of the road and knocked against the cycle. The Tribunal was right in accepting the case of the victim that it was as a result of rashness and negligence of the driver of the bus that the accident took place. This finding is further reinforced by the plea of guilty entered by R.W. 1 in the criminal Court, when he was prosecuted under section 338, Indian Penal Code, read with section 116 of the Motor Vehicles Act. The theory of R.W. 1 that in order to avoid frequent attendance in Courts and consequent expenditure, he entered a false plea of guilty has to be dismissed without any serious notice.

2. The next question that arises for determination is, what is the amount of compensation awardable ? P.W. 1, who is the Assistant to the Neuro-Surgeon, Government General Hospital, Madras, says that Murthy was admitted in his ward on 7th December, 1970 that at the time of admission he had echymosis of the right eye lids, sub-conjunctival haemorrhage on the right side, abrasion and laceration in the left fronto-parietal scalp, abrasion in the neck, abrasion over the back of right shoulder region, and abrasion on the back of right erm and on the right thigh. It is also his testimony that as a result of the injuries received during the accident, Murthy lost vision

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* A.A.O. Nos. 244 of 1972 and 80 of 1974.
29th March, 1974.

in his right eye permanently. It also appears from his evidence that Murthy was an in-patient from 7th December, 1970 upto 4th January, 1971 and thereafter he was being treated as an out-patient till 30th July, 1971. We find from P.W. 1's evidence that the victim was unconscious till 8th December, 1970 and that he was given blood transfusion. There is little reason why the medical evidence should not be accepted especially when it has not been seriously challenged in cross-examination.

3. The Tribunal has awarded damages under different heads amounting to Rs. 6,000. The Insurance Company attacks the quantum as exaggerated, whereas the victim of the accident would say that it is unreasonably low. Under the head of pain and suffering, the Tribunal has awarded a sum of Rs. 2,000. Having regard to the serious nature of the injuries sustained and the period for which the victim has been undergoing treatment, I think this is a reasonable figure and must be accepted. A sum of Rs. 500 has been awarded by the Tribunal under the head of expenses of medical treatment. I see no reason to interfere with this figure. Under the head of actual loss of earnings, the Tribunal has awarded a sum of Rs. 500 on the basis that the victim has been unable to attend to his work as salesman for a period of five months. I think it is clearly wrong. The evidence is that Murthy has been a salesman in Sri Gurunath Stores, Saidapet, Madras-15, getting a monthly salary of Rs. 100 *vide* Exhibit P-4, a certificate issued by the employer of Murthy. It is in evidence that ever since the accident upto the date of the deposition, Murthy has been without employment. Exhibit P-4 shows that his services have been terminated after the accident and that he has not been able to function as a salesman thereafter. For at least 13 months the victim has been disabled from attending to his work as a salesman and consequently lost Rs. 1,300. on this account. I would therefore enhance the compensation under the head of loss of earnings upto the date of the deposition from Rs. 500 to Rs. 1,300 It has been proved by P.W. 3 that as a result of the collision, his cycle has been completely smashed. He has claimed a compensation of Rs. 150 on that account and it is not known why the Tribunal failed to award it. Under section 110 of the Motor Vehicles Act, after it was amended by Act LVI of 1969, with effect from 2nd March, 1970 the Tribunal got jurisdiction to award compensation not only in respect of bodily injury but also in respect of damage to any property. I, therefore, award a sum of Rs. 150 on account of damage to the cycle of the victim.

4. I shall next deal with the compensation awarded under the head of permanent disability. The Tribunal has awarded Rs. 3,000 on this score. The victim is a young unmarried man aged 19 years. By losing one of his two eye, his face has been aesthetically impaired and his prospects of marriage have become dim. Eye being the most valuable among the five senses, the blacking out thereof must have considerably affected the victim's biological and psychological capacity to enjoy life. I would therefore accept the figure of Rs. 3,000 as a proper compensation for the loss of one eye. But then, the Tribunal has failed to consider the effect of the loss of one eye upon the future earning capacity of the victim. The certificate, Exhibit P-4, issued by the employer of P.W. 3 shows that the loss of one eye has already resulted in the loss of his job as a salesman. An one-eyed man is very much less in demand in the labour market than a two-eyed man. According to P.W. 1, the doctor, the disability on account of the loss of one eye may be taken to be 30 per cent. I do not understand what the doctor meant by it. Under item 25 of Part II of Schedule I do the Workmen's Compensation Act, the loss of earning capacity for loss of one eye, without complications, has been fixed 40 per cent. Though I am not bound by the percentage of loss of earning capacity given in the Workmen's Compensation Act, I think it reasonable to hold that a working man who has lost one of his two eyes would suffer thereby 40 per cent. loss in his earning capacity. The victim was earning Rs. 100 per mensem. There was the prospect of his earning much more, but for the accident, during the rest of his life. There is also the likelihood of the victim living for another 40 years. Assuming that as a result of the loss of one eye, he would have lost at the average a rate of

Rs. 50 per mensem, he would be losing Rs. 600 every year for the next 40 years. The loss per year may be capitalised at Rs. 7,000. Making allowances for a lump sum payment, I would fix this figure at Rs. 5,000.

5. The total amount would then come to Rs. 11,950. I direct it to be payable by the Insurance Company. It is said that a sum of Rs. 3,000 has been paid by the Insurance Company and withdrawn by the victim. Two months' time from to-day is granted for payment of the balance. C.M.A. No. 244 of 1972 preferred by the Insurance Company will stand dismissed. There will be no order as to costs. C.M.A. No. 80 of 1974 preferred by the victim will be allowed with proportionate costs.

6. As for the mode in which the balance may be invested, further orders will be passed in consultation with the victim, who is directed to be present in Court, next Friday, 29th March, 1974. The balance will be paid to Murthi.

R.S. —— *C.M.A. No.* 244 *of* 1972, *dismissed; C.M.A. No.* 80 *of* 1974, *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Natarajan, J.*

Annapoorani Ammal .. *Appellant**

v.

Jayavelu Mudaliar and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 10 *and Order* 22, *rule* 10—*Suit for partition—Passing of preliminary decree—Subsequent alienation of an item—Transferee from purchaser—Whether necessary party to the proceedings.*

A purchaser of an item of property from a vendee, who himself purchased that item from a party to a suit for partition, after a preliminary decree was passed cannot be impleaded as a party to the proceedings under Order 1, rule 10, Civil Procedure Code. Neither the purchaser nor his predecessor-in-title had any interest in any item of the suit property on the date of the suit. Hence the purchaser is not a necessary party in the suit for a complete and final adjudication and settlement of rights and claims. [*Para.* 3.]

The provisions of Order 22, rule 10, Civil Procedure Code, cover cases where the totality of the interest of a party to the suit is transferred to another person during the pendency of the proceedings and not where only a fraction of the interest is transferred. [*Para.* 3.]

The transferee of an item of property from the vendee, who purchased it from a party to a suit is not directly a transferee and there is no nexus between the transferee and the party to the suit from whom the property was purchased. The transferee cannot be impleaded as a party in the suit. [*Para.* 4.]

Cases referred to:—

Maharaja Sir Manindra Chandra Nandi v. *Ram Lal Bhagat*, (1922) I.L.R. 1 Pat. 581 ; *Champalal* v. *Sonabai*, I.L.R. 46 Nag. 43 ; *Kutti Ammal v. Karunawan*, 87 I.C. 402 : A.I.R. 1925 Mad. 1166 ; *Jadunath* v. *Parameshwar*, 67 I.A. 11 : (1940) 1 M.L.J. 97 : A.I.R. 1940 P.C. 11 ; *Ramaswami Chettiar* v. *Vellaiappa Chettiar*, (1931) 60 M.L.J. 229 : A.I.R. 1931 Mad. 357.

Appeal against the order of the Court of the Subordinate Judge, Tiruvannamalai, dated 7th September, 1972 and made in Interlocutory Application No. 206 of 1972 in O.S. No. 74 of 1971.

M. Jayaraman and *V. N. Krishna Rao*, for Appellant.

S. R. L. Narayanan, for Respondents.

The Court made the following

ORDER.—The first respondent in I.A. No. 206 of 1972 in O.S. No. 74 of 1971 on the file of the Subordinate Judge, Tiruvannamalai is the appellant.

2. The appellant originally instituted a suit on 24th June, 1968 for partition against her son, the first respondent herein on the file of the Court of the Subordinate Judge, Vellore. The said suit was transferred to the Court of the Subordinate Judge, Tiruvannamalai on 24th August, 1970. During the pendency of the suit and before it was transferred to the Court

* A.A.O. No. 494 of 1972. *7th December,* 1973.

of the Subordinate Judge, Tiruvannamalai the first respondent alienated three items of the suit property in favour of one Poorani Ammal. On 28th June, 1971 a preliminary decree was passed in the partition suit. After the passing of the preliminary decree *i.e.*, on 10th February, 1972 the said Poorani Ammal sold the three items of property purchased by her from the first respondent to the second respondent. Thereafter the second respondent filed a petition I.A. No. 206 of 1972 praying that she may be impleaded as a party to the proceedings in the partition suit and that she should be given an opportunity to work out her equities. The application was opposed by the appellant as well as the first respondent. But, nevertheless, the learned Subordinate Judge allowed the petition and hence this appeal by the appellant.

3. Mr. V. N. Krishna Rao, learned Counsel for the appellant contends that on account of the second respondent being a transferee from Poorani Ammal who is not a party to the suit and Poorani Ammal herself having purchased the three items of properties from the first respondent during the pendency of the suit, the second respondent is not entitled to ask for being impleaded a party in the suit and that as such the learned Subordinate Judge should not have allowed the petition I.A. No. 206 of 1972. There is considerable force in the contention of Mr. Krishna Rao in this behalf. Firstly, it has to be seen that the sale of the three items of suit properties were effected by the first respondent in favour of Poorani Ammal during the pendency of the suit, and as such the transfer will be affected by section 52 of the Transfer of Property Act. Apart from this, the sale in favour of the second respondent is subsequent to the passing of the preliminary decree. The second respondent would contend that by reason of Order 1, rule 10 or Order 22, rule 10, she is entitled to be made a party to the proceedings. This contention of the second respondent cannot be sustained. By no stretch of imagination, can the second respondent contend that her presence is absolutely necessary for an effective adjudication and settlement of all the questions involved in the suit. It is needless to say that the presence of parties has got to be determined with reference to the rights of the parties as they existed on the date of the filing of the suit. Admittedly, neither the second respondent nor her predecessor-in-title had any interest in any item of the suit properties on the date the appellant filed the suit and as such there is no question of the presence of the second respondent or Poorani Ammal being necessary in the suit for a complete and final adjudication and settlement of their rights and claims. It is therefore clear that the second respondent cannot base her claim under Order 1, rule 10, Civil Procedure Code, to be made a party to the suit. As regards Order 22, rule 10 that will be equally inapplicable to the case of the second respondent because what is contemplated under Order 22, rule 10 is a total assignment, creation or devolution of the entire interest of a party to the suit in favour of the party who wishes to bring himself on record as a party to the pending proceedings. A conspectus of all the rules in Order 22 will show that the order predominantly deals with cases where there is change of status due to the totality of the interest of a party in pending suit passing on to another person or totally abating under certain circumstances. The provisions contained in rule 10 of the order are not meant to cover cases where only a fraction of the interest and not the totality of the interest of a party to the suit is transferred to another person during the pendency of the proceedings. The Privy Council has succinctly enunciated the scope of Order 22, rule 10 in *Maharaja Sir Manindra Chandra Nandi* v. *Ram Lal Bhagat*[1] as follows :

> " The order (Order 22, Civil Procedure Code) contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon someone else. The more ordinary cases are death, marriage, insolvency, and then come the general provisions of rule 10 for all other cases. But they are all cases of devolution. There is, it should be noted in this rule, a significant change of language from that used in the earlier Code, where it is stated in section 372, as follows : ' In other cases of assignment, creation or devolution of any interest pending the

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1. (1922) I.L.R. 1 Pat. 581.

suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come either in addition to or in substitution for the person from whom it has passed, as the case may require '. The words ' in addition to ' in the earlier Code have disappeared."

4. Apart from this, there is yet another valid reason for upholding the contention of the appellant that the second respondent is not entitled to be impleaded as party in the partition suit filed by the appellant. As has been already stated above, the second respondent was not directly a transferee from the first respondent but only a transferee from the vendee of the first respondent, and on account of there being no nexus between the second respondent and the first respondent, the second respondent cannot validly contend that she has acquired interest in the property during the pendency of the suit and as such, is entitled to be made a party. In *Kutti Amma* v. *Karunawan*[1] Wallace, J., has held that "The words assignment and creation indicate that it is the person suing that assigns and creates the interest which enables the assignee to continue the suit." In *Champalal* v. *Sonabai*[2] it has been held that "A person who comes forward claiming as assignee must derive his right directly from the party to the suit or proceeding and not through an intermediary." It is therefore clear that on both the contentions urged by Mr. Krishna Rao, learned Counsel for the appellant, the order of the learned Subordinate Judge must be held clearly unsustainable.

5. Learned Counsel for the second respondent, however contends that the authorities quoted by the learned Subordinate Judge in his order lend support to the case of the second respondent and that as such the order should not be set aside. It is his further contention that the second respondent is merely seeking recognition from the Court to be made a party in the suit and that the second respondent is not agitating in this petition her equitable rights as a transferee and therefore the circumstances under which the second respondent purchased the items of property *viz.*, after the passing of the preliminary decree need not be taken into consideration in these proceedings. I am afraid, that the contentions of the learned Counsel for the second respondent cannot prevail. All the authorities relied on by the learned Subordinate Judge in his order are clearly inapplicable to the facts of this case. *Jadunath* v. *Parameswar*[1], the first case relied or by the learned Subordinate Judge related to a set of mortgagee decree-holders who raised certain contentions against the final decree proceedings and which contentions were upheld by the Privy Council. Those mortgage decree-holders had been made parties to the suit soon after a preliminary decree was passed in the partition suit, and the principal controversy was whether those decree-holders were bound by the terms of the preliminary decree which was passed prior to their being brought on record. It was in that conspectus the Privy Council held that a partition suit in which a preliminary decree had been passed was still a pending suit and therefore the rights of parties who are added after the preliminary decree, had to be adjusted at the time of the final decree. I fail to see how this decision can avail the second respondent when her application is not for adjustment of rights but for being impleaded as a party to the suit to which relief she will not be entitled to either under Order 1, rule 10 or Order 22, rule 10, Civil Procedure Code. The second case relied on by the learned Subordinate Judge *viz.*, *Ramaswami Chettiar* v. *Vellayappa Chettiar*[2], relates to an entirely different set of facts. That was a case where certain third parties alleged that there were large sums of trust funds which had to be accounted for by the members of a joint family and therefore prayed for being impleaded in the partition suit under Order 1, rule 10 (2), Civil Procedure Code. Though the application was made after a preliminary decree had been passed and a Commissioner had been appointed to take account, Eddy, J., allowed the application of the third parties

1. 87 I.C. 402 : A.I.R. 1925 Mad. 1166.
2. I.L.R. 46 Nag. 43.

1. 67 I.A. 11 : (1940) 1 M.L.J. 97 : A.I.R. 1940 P.C. 11.
2. (1931) 60 M.L.J. 229 : A.I.R. 1931 Mad. 357.

on the ground that if after accounts were taken the Commissioner found that there was excess funds the same had to be dealt with by Court and that in those circumstances the application of third parties for being impleaded in the suit had to be allowed. As I have already stated, the right which the second respondent wants to agitate after being made a party to the suit does not at all arise for consideration in the partition suit and especially as no such question existed for consideration when the suit was filed. For the foregoing reasons, the order of the learned Subordinate Judge cannot be held a legally sustainable order. Consequently, the appeal succeeds and is allowed with costs.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam and S. Maharajan, JJ.*

Thangarajan (Minor) by father and next friend T. V. Adhinarayana Chetty, No. A Block II Lane, Kasipuram, Madras-13 .. *Appellant**

v.

Union of India represented by its Secretary, Defence Department Officer in charge, I.N.S. Adyar c/o. Navy Office, Fort St. George, Madras-9 .. *Respondent.*

Constitution of India (1950), Article 300—Motor Accidents—Liability of State for tortious acts of its servants—Lorry belonging to Defence Department knocking down a boy—Claim for compensation—Lorry driven in exercise of sovereign function—State not liable for compensation.

A military lorry belonging to Defence Department was taking Carbondioxide gas from factory to the ship I.N.S. Jamuna and on the way knocked down a boy as a result of which he sustained serious injuries. He claimed compensation.

Held:
The liability of the State for the tortious act of its servants committed in discharge of sovereign functions is what it was before the Constitution came into force, as Parliament has not enacted any law under Article 300 of the Constitution. [*Para.* 12.]

The evidence shows that the lorry was being driven in the exercise of sovereign functions. This finding would exclude the liability of the Union of India. [*Para.* 12.]

It is cruel to tell the injured boy that he was not entitled to any relief as he had the privilege of being knocked down by a lorry which was driven in exercise of sovereign functions of the State. Considering the circumstances of the case, the Court recommended to the Union Government to make an *ex gratia* payment of Rs. 10,000 to the injured boy. [*Para.* 17].

Cases referred to :—

State of Rajasthan v. *Mst. Vidyavathi*, (1963) 1 S.C.J. 307 : (1963) 1 M.L.J. (S.C.) 70 : (1963) 1 An.W.R. (S.C.) 70 : A.I.R. 1962 S.C. 933 ; *Kasturilal* v. *State of Uttar Pradesh*, (1965) M.L.J. (Crl.) 571 : (1965) 2 An.W.R. (S.C.) 15 : (1965) 2 M.L.J. (S.C.) 15 : (1965) 2 S.C.J. 318 : A.I.R. 1965 S.C. 1039 ; *The Peninsular and Oriental Steam Navigation Co.* v. *The Secretary of State for India*, (1868-69) 5 Bom.H.C.R. 1 ; *Madhava Rao Scindia* v. *Union of India*, (1971) 1 S.C.J. 295 : (1961) 3 S.C.R. 9 : A.I.R. 1971 S.C. 530; *Post-Master-General, Nagpur* v. *Radha Bai*, 1969 S.C.D. 777; *Superintendent and Legal Remembrancer, State of West Bengal* v. *Corporation of Calcutta*, (1967) 2 S.C.R. 170 : A.I.R. 1967 S.C. 997; *Satya Wati Devi* v. *Union of India*, (1968) A.C.J. 119 ; *Union of India* v. *Sugrabai Abdul Majid*, (1968) A.C.J. 252.

Appeal against the order of the Motor Accidents Claims Tribunal (Chief Judge, Court of Small Causes), Madras, dated 4th February, 1972 and made in O.P. No. 442 of 1970.

Sivamani, for Appellant.

S. M. Ali Mohammed, for Respondent.

The Court made the following :

ORDER.—The claimant in M.A.C.T.O.P. No. 442 of 1970 on the file of the Motor Accidents Claims Tribunal, Madras, is the appellant before us. The appellant Minor Thangarajan, aged about 10 years

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* A.A.O. No. 297 of 1972.

20th December 1973.

at the time of the accident was walking along Suryanarayana Chetty Road on 14th May, 1970 at about 12 noon. The military lorry UD 40494 belonging to the Defence Department of the Union of India knocked Thangarajan as a result of which he sustained serious injuries. He claimed a compensation of Rs. 45,000.

2. The Union of India represented by the Secretary, Defence Department raised various defences. Firstly it was contended that the accident was not due to the rash or negligent driving on the part of the driver of the lorry and that it was due to the reckless crossing of the road by the petitioner Thangarajan. It was also contended that the respondent, Union of India is not liable for the tortious act of its servant, namely, the driver of the lorry, committed in the course of the exercise of its sovereign functions.

3. The Tribunal found that the appellant sustained grievous injuries as a result of rash driving of the lorry by the driver. But it found that the Union of India is not vicariously liable for the tortious act of the driver of the lorry as the act was committed in the course of exercise of sovereign functions. In the event of the defendant being held liable, the Tribunal fixed the the compensation payable to the appellant at Rs. 10,000.

4. The evidence regarding the incident is given by the injured boy P.W. 2 and the head constable P.W. 5. P.W. 2 would state that he was crossing the road to go to the other side and that at that time, the military lorry came at a high speed without sounding the horn and knocked him down. He denied the suggestion that a State Transport bus was stationary at that time and he crossed the road behind that bus. The investigating Officer P.W. 5 went to the spot immediately on receipt of information and drew up the plan Exhibit P-2. The road was 48 feet wide at that place and repairs were going on, on the road for a width of 10 feet. P.W. 5 found tyre marks to a distance of about 20 feet. It is also in evidence that a part of the road was under repair and that only a single vehicle could pass along the unrepaired portion of the road. From the fact that the road was under repair and that a single vehicle alone could pass along the unrepaired portion of the road and the presence of skid marks to a distance of twenty feet, the Tribunal expressed the view that the driver of the lorry was guilty of rash driving. As the road was under repair, it was the duty of the driver to have bestowed utmost caution while driving a vehicle and we feel that the Tribunal was right in accepting the evidence given by P.Ws. 2 and 5. The driver of the lorry was not examined as he was on duty and was not available.

5. Regarding the compensation payable to the appellant, if it was found that the defendant was liable, the Tribunal fixed it at Rs. 10,000. The injured boy was in the hospital from 14th May, 1970 to 1st October, 1970. He had very serious injuries as spoken to by P.W. 3. There was swelling over the fore-head with tenderness, abrasior over the entire abdomen and right side of chest with bleeding ; the skin and the sub-cutaneous tissue of the whole of right thigh and right gluteal region had been peeled off and the flap attached along the addctuor aspect of the right thigh with evidence of fracture of the right femur and muscles exposed. There was an abrasion over the outerside of left thigh and another abrasion over the anterior of the right cubital fossa and another abrasion over the back of right popletal fossa. He was discharged on 1st October, 1970, but again admitted and he underwent plastic surgery treatment and also skin grafting operation of the right thigh at that time. Having regard to the very serious nature of injurious sustained by the appellant, the period of his stay in the hospital and the several operations he had to undergo, the Tribunal fixed a sum of Rs. 4,000 as compensation under the head of 'pain and suffering'. This amount is reasonable and we do not see any ground to interfere.

6. According to the father of the boy, he had to spend Rs. 4,300 towards the treatment of the boy. But he has not produced any receipts. While observing that P.W. 1 would have been put to considerable expenditure for conveyance, for purchase of nutritious food, milk, etc., the Tribunal allowed a sum of Rs. 1,000 under the head of 'expenses for treatment'. Though the amount appears to be on the low side as contended by the

learned Counsel for the appellant, we are not inclined to interfere.

7. The third head was 'compensation for permanent disability'. The boy is not able to walk freely and the doctor has stated that the boy would have to be operated again to enable him to walk properly. The claimant is a young boy of 13 years and he would have to suffer permanent injury right through his life. Under this head, the Tribunal has awarded a sum of Rs. 5,000. We feel that this is a proper compensation for the permanent injury. In short, we agree with the Tribunal that a sum of Rs. 10,000 would be the appropriate compensation if the appellant is entitled to recover it from the respondent.

8. The most important question that arises for consideration in this case is whether the respondent who is the Union of India by the Secretary, Defence Department Commanding Officer I.N.S. Adyar is liable to pay any compensation. The plea that was taken is that the lorry was driven in the course of exercise of sovereign functions of the respondent. The circumstances under which the lorry was being driven are found in the evidence of R.W. 1 as well as in the entry Exhibit R. 1. R.W. 1 Lt. Viswanathan attached to the Navy Office stated that at the request of the ship I.N.S. Jamuna that CO2 gas was required for the ship, the lorry was detailed for collection of CO2 gas from M/s. South India Carbonic Gas Industries Factory and that on the way from the port to the factory, the accident happened. The entries in Exhibit R-1 and the evidence of R.W. 1 make it clear that for the purpose of supplying CO2 gas to I.N.S. Jamuna, the lorry was detailed to collect the gas from the factory and to deliver it to the ship and that during the trip, the accident occurred. It is not clear from the entries Exhibit R. 1 and the evidence of R.W. 1 for what purpose CO2 gas was required for the ship. We can take it that the supply of gas was required for the purpose of the ship. From the evidence we are satisfied that the lorry was being driven for taking CO2 gas to the ship I.N.S. Jamuna. It is also seen that the driver of the lorry one Lukes belongs to the Defence Department and at the time of the trial of the petition, he was engaged in the forward area. It is therefore clear that the lorry was driven for the purpose of supply of CO2 gas to the ship I.N.S. Jamuna and this will amount to defence purpose.

9. The important question that arises for consideration is whether under the circumstances the Defence Department is liable. The law on this question has been laid down by the Supreme Court in two decisions, namely, in *State of Rajasthan* v *Mst. Vidyavathi*[1] and *Kasturilal* v *State of Uttar Pradesh*[2]. The liability of the State for any tortious act committed by its servant while discharging a duty assigned to him by virtue of delegation of sovereign power is historical in its evaluation. The East India Company which started as a trading concern acquired territories and started exercising soveriegn functions. When the British Crown took over the administration of the territories administered by the East India Company, Government of India Act, 1858 was passed. The liability of the State being sued was embodied in section 65 of the Act. It provided that the Secretary of State in Council can be sued as it could be done against the said Company. Section 65 of the Government of India Act was re-enacted as section 32 of the Government of India Act, 1915 and as section 176 of the Government of India Act, 1935. In the Constitution, the corresponding provision is Article 300 (1). Article 300 (1) provides that the Government of India may be sued in relation to its affairs in the like cases as the Dominion of India, subject to any provisions which may be made by Act of Parliament. The Parliament has not made any provision and therefore the question has to be determined as to whether the suit would be competent against the Dominion of India before the Constitution came into force. The classic decision on the subject is *The Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India*[3] rendered by Peacock, C.J. The facts of the case were that a servant of the plaintiffs was proceeding from Garden

1. (1963) 1 S.C.J. 307 : (1963) 1 M.L.J. (S.C.) 70 : (1963) 1 An.W.R. (S.C.) 70 : A.I.R. 1962 S.C. 933.
2. (1965) 2 S.C.J. 318 : (1965) M.L.J. (Crl.) 571 : A.I.R. 1965 S.C. 1039.
3. (1868-69) 5 Bom. H.C.R. App. 1.

Reach to Calcutta in a carriage drawn by a pair of horses belonging to the plaintiffs, and driven by a coachman in their employ. While the coach was passing along Kidderpore Dockyard which is a Government dockyard of which the superintendent of Marine is the head, certain workmen in Government employ who had been engaged in riveting a piece of iron funnel casing, weighing about three hundred weight and being eight or nine feet long and about two feet high, were carrying the rod along the road. The men carrying the load were walking along the middle of the road. The coachman called out to warn the men who were carrying the iron. The men attempted to get out of the way, those in front tried to go to the one side and those behind tried to go to the other. The consequence of this was a loss of time, which brought the carriage close up to them, before they had left the centre of the road. They got alarmed at the proximity of the carriage and the horses and suddenly dropped the iron and ran away. The iron fell with a great noise which startled the plaintiff's horses which thereupon rushed forwards violently and fell on the iron resulting in injuries to one horse. That the injuries to the horse were due to the negligence of the defendant's servants was not disputed before the learned Judge, and the case proceeded on that basis. The learned Judge after elaborately considering several decisions referred to the commercial business indulged in by the Company and observed that the commercial business was continued to be carried on by the Government. Referring to the Bengal Marine and the Bullock Train which were established by the East India Company and continued by the Government for conveyance by sea, by river and by land not merely of public officers and of Government stores, but also of private passengers and goods for hire, the learned Judge held that while indulging in such activities, the East India Company and the Government would be subject to the same liabilities as individuals. In this connection, the learned Judge observed as follows :—

> " We are of opinion that for accidents like this, if caused by the negligence of servants employed by Government, the East India Company would have been liable, both before and after the 3rd and 4th Wm. IV, c. 85 and that the same liability attaches to the Secretary of State in Council, who is liable to be sued for the purpose of obtaining satisfaction out of the revenues of India."

After stating the position which concerned with the activities of servants employed by the Government, the learned Judge proceeded to state the law as follows :—

> " But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action will lie."

10. In *State of Rajasthan* v. *Mst. Vidyavathi*[1], the Supreme Court was considering the case in which the driver of a jeep, owned and maintained by the State of Rajasthan for the official use of the Collector of a district, drove it rashly and negligently, while bringing it back from the workshop after repairs and knocked down a pedestrain and fatally injured him. The Court while holding that in so far as the Legislature has not enacted a law as contemplated in Article 300 (1) of the Constitution, it must be held that the law is what it has been ever since the time of the East India Company. The Court also recorded a finding that it has not been showed that " the Rajasthan Union would not have been liable for the tortious act of its employee in the circumstances disclosed in the present case." Certain observations were also made in the decision to the effect that when the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution. This particular passage would indicate that the Supreme Court was of the view that the immunity from liability of the State for tortious act committed by its servant when exercising sovereign powers delegated to it cannot be sustained. But as pointed out already in conclusion, the Supreme Court expressed the view that

1. (1963) 1 S.C.J. 307 : A.I.R. 1962 S.C. 933.

in the absence of a law being enacted by the Government under Article 300 (1) of the Constitution, the law in force enforced today is the law that was in force ever since the days of the East India Company.

11. In the later decision in *Kasturilal* v. *State of Uttar Pradesh*[1], the Supreme Court clarified the position. It elaborately considered the decision in *State of Rajasthan* v. *Mst. Vidyavathi*[2] and explained what it purported to lay down as the law. It formulated the position of law thus :—

> " If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is : was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant ? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie."

The Supreme Court pointed out that on the facts of the decision in *State of Rajasthan* v. *Mst. Vidyavathi*[2] it cannot be said that the driver while driving the jeep from the workshop to the Collector's residence was employed on a task or an undertaking which can be said to be referable to, or ultimately based on the delegation of sovereign or governmental powers of the State, and that the negligent act in driving the jeep car from the workshop to the Collector's residence cannot claim immunity. The Supreme Court observed:—

> " In fact, the employment of a driver to drive the jeep car for the use of a civil servant is itself an activity which is not connected in any manner with the sovereign power of the State at all. That is the basis on which the decision must be deemed to have been founded ; and it is the basis which is absent in the case before us."

The Supreme Court further held that the act of negligence committed by the police officers (in that case) while dealing with the property of the plaintiff which they had seized was in exercise of their statutory powers and that the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers.

12. On an analysis of the two decisions of the Supreme Court cited supra, it is clear that the liability of the State for the tortious act of its servants committed in discharge of sovereign functions is what it was before the Constitution came into force, as the Parliament has not enacted any law under Article 300 of the Constitution. We have already held that the driver of the lorry was himself a defence personnel and was driving the lorry for taking CO_2 gas from the factory to the ship I.N.S. Jamuna and on the way the accident has happened. On the evidence on record, we cannot resist the conclusion that the lorry was being driven in the exercise of sovereign functions. This finding would exclude the liability of the defendant and the appeal will have to be dismissed.

13. A Division Bench judgment of this Court in S.A. No. 779 of 1967 was brought to our notice. In that case, the question that arose for consideration was whether a suit against the Government for recovery of damages for malicious prosecution and for recovery of the value of the crop alleged to have been stolen is maintainable. It was held that the suit was maintainable and the law as laid down by the Supreme Court in *State of Rajasthan* v. *Mst. Vidyavathi*[1] should be preferred to the law laid down in *Kasturilal* v. *State of Uttar Pradesh*[2]. In coming to this conclusion, the Bench of this Court relied on a certain passage in *The Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India*[3]. This passage in the judgment commencing from " we are of opinion that for accidents like this

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1. (1965) M.L.J. (Crl.) 571 : (1965) 2 S.C.J. 318 : A.I.R. 1965 S.C. 1039.

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1. (1963) 1 S.C.J. 307: A.I.R. 1962 S.C. 933.
2. (1965) 2 S.C.J. 318 : A.I.R. 1965 S.C. 1039.

.... out of the revenues of India'' occurs when it refers to the case before it, namely, a case of tortious act committed by a Government servant indulging in commercial activity of the Government and not a sovereign activity. The Bench of this Court also proceeded to observe that Peacock, C.J., proceeded with the further question "which is outside the scope of the reference." With respect, we are unable to treat the views of the learned Judge as mere *obiter-dicta.* The learned Chief Justice after having stated the law regarding tortious acts of Government servants employed in commercial activities, proceeded to deal with the liability of the State in respect of tortious acts committed by persons engaged in sovereign activities. We are equally unable to subscribe to the view of the Bench of this Court that Gajendragadkar, C.J., in *Kasturilal* v. *State of Uttar Pradesh*[1] followed the second part of the judgment of Peacock, C.J., in *The Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India*[2] while referring to the decision in *State of Rajasthan* v. *Mst. Vidyavathi*[3]. We would normally have been obliged to refer the matter to a Full Bench as we are not in agreement with the view taken by the Bench of this Court, if the question had not been concluded by the Supreme Court. The view of the Bench of this Court is not good law, since the later Supreme Court decision has clearly explained its earlier decision and laid down the law. A later decision, especially when it explains an earlier decision, is the law to be followed. The Bench of this Court also referred to the decisions in *Madhava Rao Scindia* v. *Union of India*[4] and *Postmaster-General, Nagpur* v. *Radha Bai*[5] and concluded that the view expressed in the earlier decision in *State of Rajasthan* v. *Mst. Vidyawati*[3] has been approved in these two decisions. We do not see any basis for this view. The passage referred to by the Bench of this Court in *Madhava Rao Scindia* v. *Union of India*[4] occurs at page 620 in paragraph 276. The Court was dealing with the powers of the President under Article 366 (22) of the Constitution. The Court observed that the legal sovereignty in this country vested with the Constitution and the political sovereignty was with the people of the country, and the executive possessed no sovereignty and that there was no analogy between the President and the British Crown as the President is the creature of the Constitution; but proceeded to add that the President can only act in accordance with the Constitution. The question therefore as to the liability for the tortious act of a Government servant in the exercise of sovereign power is governed solely by the provisions of the Constitution in Article 300 (1).

1. (1965) M.L.J. (Crl.) 571 : (1965) 2 S.C.J. 318 : A.I.R. 1965 S.C. 1039.
2. (1868-69) 5 Bom. H. C. R. App. 1.
3. (1963) 1 S.C.J. 307 : A.I.R. 1962 S.C. 933.
4. (1971) 1 S.C.J. 295 : A.I.R. 1971 S.C. 530.
5. 1969 S.C.D. 777.

14. In *Postmaster-General, Nagpur* v. *Radha Bai*[1] referred to in the Division Bench judgment of this Court, the Postmaster-General was the appellant in the appeal against the order of the Bombay High Court holding that the Union of India was responsible in a case in which the driver of a rickshaw was killed due to the negligence of the driver of the truck belonging to the postal department. On the facts of the case, the High Court repelled the argument of the department that the Union of India was not responsible for the tortious act committed by its servants. On appeal before the Supreme Court, the Counsel for the postal department stated before the Court that in view of the decisions of the Supreme Court in *Superintendent and Legal Remembrancer, State of West Bengal* v. *Corporation of Calcutta*[2] and *State of Rajasthan* v. *Mst. Vidyavathi*[3] he was not in a position to press the appeal. The decision in *Kasturi Lal* v. *State of Uttar Pradesh*[4] was not even mentioned. The appeal was dismissed as not pressed. Under the circumstances, the decision in *Postmaster-General, Nagpur* v. *Radha Bai*[1] cannot be taken as one following the decision in *State of Rajasthan* v. *Mst. Vidyavathi*[3] in preference to the decision in *Kasturi Lal* v. *State of Uttar Pradesh*[4]. As the Division Bench decision of this Court, cited supra, is not in accordance with the decision of the Supreme Court in *Kasturi Lal* v. *State of Uttar Pradesh*[4] and as none of the

1. 1969 S.C.D. 777.
2. (1967) 2 S.C.R. 170 : A.I.R. 1967 S.C. 997.
3. (1963) 1 S.C.J. 307 : A.I.R. 1962 S.C. 933.
4. (1965) 2 S.C.J. 318 : (1965) M.L.J. (Crl.) 571 : A.I.R. 1965 S.C. 1039.

of the later decisions of the Supreme Court has in any way doubted the correctness of the decision in *Kasturi Lal* v. *State of Uttar Pradesh*[1], the view of the Division Bench of this Court is unsupportable in law and cannot be treated as a precedent.

15. After the hearing was concluded and the judgment was reserved, learned Counsel for the appellant requested that the case may be posted for further hearing as he had failed to bring to the notice of this Court two decisions which he considered relevant and not cited during the hearing. The appeal was again taken up and two decisions in *Satyavathi Devi* v. *Union of India*[2], and *Union of India* v. *Sugrabai Abdul Majid*[3] were cited before us. In *Satyavati Devi* v. *Union of India*[2], an Air Force vehicle at the time of the accident was carrying a hockey team. In repelling the contention that the State was not liable as the truck which caused the accident was carrying a hockey team for the purpose of physical exercise by the Air Forcemen, the Court held that carrying a hockey team to play a match can by no process of extension be termed as exercise of sovereign powers. On the facts of the case, the Court distinguished the decision in *Kasturi Lal* v. *State of Uttar Pradesh*[1].

16. In *Union of India* v. *Sugrabai Abdul Majid*[3], a Military truck knocked down a cyclist while it was engaged in carrying a machine meant for training military officers. On the facts of the case, the Bombay High Court held that it cannot be said that the driver was acting in exercise of any delegated sovereign power of the State and therefore the State was liable to pay compensation. As pointed out by the learned Judges who decided the case that although the principles which determine the immunity of the State in respect of torts committed by its servants during the course of their duty can now be taken as well settled by the decision in *Kasturi Lal* v. *State of Uttar Pradesh*[1] it is by no means easy to supply the principle to particular cases. We respectfully agree with the above observations of the Bombay High Court. The decisions rendered by the Bombay High Court and the Delhi High Court were on the facts of the particular case and do not help us to decide the case before us.

1. (1965) M.L.J. (Crl.) 571 : (1965) 2 S.C.J. 318 : A.I.R. 1965 S.C. 1039.
2. (1968) A.C.J. 119.
3. (1968) A.C.J. 252.

17. We would like to refer to the strong plea made by the Supreme Court for the enactment of a legislation to regulate and control the claim of the State for immunity. This immunity has become a historical anachronism. In England, they have gone back on the maxim that "The King can commit no wrong", and the doctrine of immunity of the State which had been borrowed by India from England is no longer in existence in England as it has been substantially modified by the Crown Proceedings Act, 1947. As pointed out by the Supreme Court in *State of Rajasthan* v. *Mst. Vidyavathi*[1], there is hardly any justification for the State to claim immunity especially after India has become a democratic republic and a Constitution had been enacted. It is cruel to tell the injured boy who has suffered grievous injuries and was in hospital for over six months incurring considerable expenditure and been permanently incapacitated that he is not entitled to any relief as he had the privilege of being knocked down by a lorry which was driven in exercise of sovereign functions of the State. Considering the circumstances of this case, we would strongly recommend to the Union Government to make an *ex gratia* payment of Rs. 10,000 to the appellant herein.

18. In the result, the appeal is dismissed. There will be no order as to costs.

S.J. *Appeal dismissed.*

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1. (1963) 1 S.C.J. 307 : (1963) 1 M.L.J. (S.C.) 70 : (1963) 1 An.W.R. (S.C.) 70 : A.I.R. 1962 S.C. 933.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Natarajan, JJ.*

T. V. Velmurugayya Pillai and others .. *Appellants**

v.

K. V. Lakshmana Perumal .. *Respondents*.

Hindu Succession Act (XXX of 1956), section 14 (1) and (2)—Property got by a female under partition in lieu of maintenance—Whether enlarged.

Section 14 (1) of the Hindu Succession Act deals only with property possessed by a female Hindu whether acquired before or after the commencement of the Act and such property shall be held by her as full owner thereof and not as a limited owner. The circumstances contemplated in sub-section (1) of section 14 of the Act are totally different from these contemplated in sub-section (2). The source of title under which the interest is created in a female owner becomes important. If the foundation of title makes it clear that the female heir is to get a restricted estate, then the doctrine of enlargement contained in section 14 (1) is not automatically invoked. If the source of title creates only a restricted estate in the female heir the rule of enlargement contained in sub-section (1) of section 14 would be completely out of consideration. [*Para.* 8.]

In the instant case, since the female got only a limited interest in lieu of her maintenance section 14 (2) and not section 14 (1) will apply. [*Para.* 8.]

Cases referred to :

Gurunadham Chetti v. *Navaneethamma*, (1967) 1 M.L.J. 454 : 80 L.W. 253 : A.I.R. 1967 Mad. 429; *Santhanam* v. *Subramania*, I.L.R. (1967) 1 Mad. 68.

Appeal against the decree of the Court of the Subordinate Judge, Tirunelveli, dated 30th March, 1968 in O.S. No. 122 of 1966.

* Appal No. 464 of 1968. 20th *December*, 1973.

S. Ramalingam, for Appellant.

D. Ramaswami Iyengar and *Krishnamachary*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—Late Velayutham Pillai had three sons, T. V. Velmurugiah Pillai, the first defendant, K. V. Lakshmanaperumal, the plaintiff, and Ramasubramaniam, the last two being admittedly twins, Velayutham Pillai died in the year 1930 leaving behind him his wife Gomathiammal and daughter Shanmughathammal besides his three sons of whom two were minors. After his death, under the original of Exhibit A-1, dated 24th December, 1942 a partition was effected as between the defendant, the plaintiff and the said Ramasubramaniam, the latter two as minors being represented by their mother and natural guardian Gomathiammal. We may at once record that on the date when Velayutham died in 1930, Gomathiammal, as widow, had only a right of maintenance from the joint family properties. Under the partition deed Exhibit A-1 certain properties were earmarked in lieu of maintenance of their mother Gomathiammal and it was also agreed that after the death of Gomathiammal, one of the properties, which is the suit property, mentioned therein, was to be divided equally between the plaintiff and the first defendant and in consideration thereof, Ramasubramaniam should be given owelty to equalise his share. The plaintiff's case is that the said partition was given effect to and was acted upon. Gomathi Ammal died on 14th August, 1966. The case of the plaintiff is that he spent for her protracted illness as also for her funeral expenses. After the death of Gomathiammal, finding that the first defendant was attempting to set up an exclusive title to the suit property, the plaintiff came to Court, after issuing the suit notice Exhibit A-32, dated 26th September, 1966, demanding partition, with the present suit seeking for a partition and separate possession of his half share in the suit house in accordance with the terms of Exhibit A-1. The first defendant raised a very curious contention. According to him, the plaintiff and his twin brother Ramasubramariam, were majors at the time when

Exhibit A-1 was entered into and, therefore, the entire arrangement by which the partition was effected is *ab initio void*. His second contention was that the plaintiff, subsequent to the partition as above, went in adoption to another family and, therefore, disentitled himself to claim a share in the suit house. The third contention of his was that certain properties, which ought to have been brought into the hotchpot for the purpose of partition between himself and the plaintiff not having been so brought into it by the plaintiff and deliberately avoided, the suit is bad for partial partition. One other contention was also raised that Gomathiammal secured an interest under the partition deed Exhibit A-1, which interest was enlarged by the Hindu Succession Act of 1956, and that, therefore, section 14 (1) of the Act would apply and not section 14 (2) therein. Lastly, a claim was made by the first defendant that he spent certain amounts towards the medical treatment and funeral expenses of his mother and that in any event he should be reimbursed by the plaintiff to which the plaintiff also made a counter claim stating that he equally, if not more, spent, towards such medical and funeral expenses.

2. Defendants 2 to 6 have been added as party defendants to the action as sons of the first defendant and they adopted the written statement of the first defendant; Apart from sailing with their father, defendants 2 to 6 raised an additional ground of defence to the effect that Exhibit A-1 was signed by their father under the influence of his mother and their uncle, the husband of Shanmugathammal.

3. On these contentions, the following issues and the additional issue were raised by the defendants:

1. Whether the partition deed is invalid in law and plaintiff cannot claim any right in the suit property on the basis of the partition deed ?

2. Whether the plaintiff cannot claim any right in the suit property, in view of his adoption in another family ?

3. Whether the defendant is liable to account ?

4. To what relief, if any, is the plaintiff entitled ?

Additional issues were framed on 1st December, 1967 :

1. Whether the first defendant spent amounts for the medical treatment and funeral of his mother ?

2. Whether the first defendant is entitled to the counter-claim ?

Additional issued framed on 3rd February, 1968 were :

1. Whether the suit is bad for partial partition ?

2. Whether the plaintiff is entitled to the amount claimed in the reply statement ?

4. On all the issues the defendants failed and even the plaintiff could not succeed in his counter claim in the sum of Rs. 1,400 said to have been spent by him towards the medical and funeral expenses of his mother. The aggrieved defendants are the appellants before us. The same contentions raised before the learned Subordinate Judge are repeated before us.

5. In so far as the contentions of the defendants that the partition deed is invalid in the eye of law, since the plaintiff and Ramasubramaniam were majors on the date when Exhibit A-1 was entered into and were not minors as alleged in the partition deed, the Court below found that they were minors. This finding was rendered on the basis of Exhibit A-2 and A-67, which are birth extracts of the plaintiff and his twin brother Ramasubramaniam. There is no evidence contra let in by the first defendant to sustain his case that there is any impropriety or irregularity in the recitals made in Exhibit A-1. We, therefore accept that Exhibit A-1 does not suffer from any infirmity as alleged by the defendants-appellants.

6. Regarding the contention whether the first defendant was unduly influenced by his mother or his brother-in-law, when he entered into the partition deed Exhibit A-1, the lower Court rightly did not accept the case of defendants, who besides stating the same, did not adduce any evidence in support of it. We find, therefore, that Exhibit A-1 is not bad for the reason that the first defendant was compulsorily made a party to it, he having

been unduly influenced by his mother or his brother-in-law.

7. The next question is whether the plaintiff has no right to seek for a partition of the suit property in view of his adoption to another family. That the plaintiff was adopted is not in dispute. But the question is, whether the pre-existing right, which a member of the coparcenary has secured prior to his being adopted to another family, would be divested by the supervening event of adoption. On the date when the plaintiff was adopted, he had already secured a vested right to secure a half share in the suit property. But his right to obtain possession thereof was only postponed till the life time of his mother Gomathiammal. The supervening circumstance of his being taken away in adoption in another family cannot divest such a right which has become irrevocable in the eye of law and which is in accordance with the personal law of the party. No authority has been placed before us to substantiate this contention. The lower Court, therefore, rightly agreed with the plaintiff and discountenanced the contention of the first defendant that by reason of the adoption of the plaintiff to another family, he lost his right to demand a partition and separate possession of the suit property, which admittedly he obtained under Exhibit A-1. and to which the first defendant was also a willing party.

8. The third contention of the first defendant was that the life interest given to Gomathiammal under Exhibit A-1, automatically enlarged itself into full-fledged proprietary interest under section 14 (1) of the Hindu Succession Act and that, therefore, the partition claimed by the plaintiff as if it is partible property and as if it is divisible under section 14 (2) of the Act, is not maintainable. The trial Court noticed that the recitals in the partition deed were to the effect that Gomathiammal should enjoy the suit house and other properties mentioned therein for herself without powers of alienation. It was also mentioned expressly that the first defendant should take the western half of the suit property and the plaintiff should take the eastern half. We have already referred to the fact that a sum of Rs. 700 was payable by each of the brothers as owelty to Ramasubramaniam. After noticing such features in Exhibit A-1, the learned trial Judge went into the question as to what was the nature of the interest which Gomathiammal secured under the partition deed Exhibit A-1. The right, which Gomathiammal, secured under the partition deed was only declaratory in nature in the sense that it gave her a right to enjoy certain properties of the family for life in lieu of her maintenance. In *Gurunadham Chetti* v. *Navaneethamma*[1], Natesan, J., said:

> "For sub-section (2) of section 14 to apply it is an essential condition that the instrument which limits or restricts the estate should itself be the source of foundation of the female's title to the property......A right of, maintenance, even if charged over a specified property, does not by itself amount to a transfer of the property but only creates a right of payment over the property."

To the same effect is another decision of our Court in *Santhanam* v. *Subramania*[2], Veeraswami, J., as he then was, explained the scope and effect of a maintenance grant given to a female Hindu at or about the time of partition or a family arrangement. The learned Judge said that it was not possible to accept the contention that when a female Hindu was giver property in lieu of maintenance, it was merely declaratory of her pre-existing right and right to maintenance, was an abstract right which was in the nature of *spes successionis*; in no sense could such a right be described as a right to or in property. Under section 14 (2) of the Hindu Succession Act, if the foundation of title makes it clear that the female heir is to get a restricted estate in such property, then the doctrine of enlargement contained in sub-section (1) to section 14 of the Act is not automatically invoked to consider whether the property held by a female owner on the appropriate date under the Succession Act is enlarged or restricted by the instrument, (the deed of gift or the testamentary instrument or an award as the case may be) whereunder the female heir secures an

1. (1967) 1 M.L.J. 454 : 80 L.W. 253 : A.I.R. 1967 Mad. 429.
2. I.L.R. (1967) 1 Mad. 68.

interest in the property and which is the sole guide for interpretation. If the text of the said source of title creates only a restricted estate in the female heir in such property, then the rule of enlargement contained in sub-section (1) of section 14 would be completely out of consideration. Section 14 (1) of the Act deals only with property possessed by a female Hindu whether acquired before or after the commencement of this Act and such property shall be held by her as full owner thereof and not as a limited owner. The circumstances contemplated in sub-section (1) of section 14 of the Act are totally different from those contemplated in sub-section (2) of section 14 of the Act. It is in this context that the source of title under which the interest is created in a female owner becomes important. In the instant case under Exhibit A-1 Gomathiammal got only a limited interest and thereby a restricted estate in the house. By reason of sub-section (2) of section 14, this cannot be enlarged under section 14 (1) of the Act. The learned Subordinate Judge, therefore, rightly accepted the contention of the respondent that in the instant case section 14 (2) of the Act is the proper provision of law to be applied and not section 14 (1) of the Act as contended by the first defendant.

9. The other contention raised by the first defendant was that in any event he should be reimbursed for all the amounts he spent towards the medical and funeral expenses of his mother. This was equally counter-claimed by the plaintiff, who in turn projected the case that he spent such amounts by himself. Both the claims made by the plaintiff and the first defendant were negatived by the Court below, which on hearing the parties, was satisfied that no one of them was entitled to any reimbursement as claimed. The trial Court was right in having referred to the partition deed whereunder the first defendant and the plaintiff took over the responsibility equally to spend for the medical and funeral expenses of their mother. According to the learned Subordinate Judge no case has been made out by either of the parties as against the other for the claim as put forward respectively by them in their pleadings and in the course of the hearing.

10. Regarding the claim of the defendants that the suit is bad for partial partition, we are constrained to state that the first defendant was ever anxious to non-suit the plaintiff on this ground and he has no reliable data to state that the suit is bad for non-inclusion of other partible items. As a matter of fact the first defendant in his anxiety to non-suit the plaintiff has sought to claim an interest in properties in which the female was at no time interested. The property described in Schedule V in the written statement was under Exhibit A-41, dated 24th December, 1942 gifted away to Velayutham Pillai's daughter Shanmugathammal. The first defendant is seeking to bring that property once again to the hotch-pot. This was rightly negatived by the Court below. Again the properties described in schedules to the written statement were long before endowed to the charities to the knowledge of the first defendant himself ; but yet he would seek for a partition of those properties and claim that the suit is one for partial partition. This contention was again negatived, rightly.

11 Regarding the properties in schedules 2 and 4 they are 'Muttram' water pump and pathway etc., which were kept admittedly in common enjoyment of the family members. It is not known as to why the first defendant is trying to reopen the closed partition and ask for partition of properties such as path-way, water-pump, etc. Excepting to spite the plaintiff, there is no substance in this part of the defence. Some other items, which the parties do not own at all, are said to be the properties of the family and not brought for the purpose of partition. This again is a defence put forward by the first defendant without any propriety whatsoever. Having considered the nature of the evidence let in and exaggerated nature of the claim, the trial Court rightly held that the suit is not bad for partial partition.

12. Lastly, defendants 2 to 6 though not through their father but by themselves, would pretend that Exhibit A-1, dated 24th December, 1942 was a deed of partition brought about by undue influence of his (1st defendant) mother and her paternal aunt's husband. This defence comes with ill-grace from defen-

dants 2 to 6 when the first defendant himself is silent about it. On all the materials, therefore, the Court below found against the first defendant. We, after deep consideration and after hearing the learned Counsel for the plaintiff, have no hesitation in reiterating the findings rendered by the trial Court in favour of the respondent. The appeal, therefore fails and is dismissed. There will be no order as to costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—*P. S. Kailasam and S. Maharajan, JJ.*

The Union of India owning the South Eastern Railway, represented by General Manager, Calcutta and another .. *Appellants**

v.

S. Sonraj, represented by his power-of-Attorney Agent, Shah Sukraj, Poonamchand .. *Respondent.*

Indian Railways Act (IX of 1890), before amendment by Act (IX of 1961), sections 72 and 75—Scope of protection under section 75—Liability of Railway for short-delivery of part of the goods consigned—When arises.

Under section 72 of the Railways Act the responsibility of the Railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, (IX of 1872). The Rail-way is responsible as a bailee for the loss, destruction or deterioration of the goods delivered to it. [*Para.* 8.]

Section 75 of the Railways Act draws a clear distinction between "articles" and "parcel" or "package". When articles required to be declared under the second schedule are not properly declared, the protection afforded by the section to the Railway is for the loss, destruction or deterioration of the parcel or package. The protection is not confined only to the articles required to be declared. It extends to the whole of the parcel or package. [*Para.* 10.]

The protection afforded under section 75 would cover even a partial loss of the parcel or package. [*Para.* 14.]

Cases referred to :—

Pundlik Udaji Jadhav v. *S. M. Railway Company*, (1909) I.L.R. 33 Bom. 703 : 3 I.C. 961; *Union of India* v. *Jatmall Sukanraj*, (1971) 2 M.L.J. 257 ; *Great Indian Peninsular Railway* v. *Sham Manohar*, (1912) I.L.R. 34 All. 422; *Eastern Indian Railway Company* v. *Chenga Khan*, (1915) 28 I.C. 245 ; *Eagle Star Insurance Company* v. *Moolchand*, (1965) 2 M.L.J. 460.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Venkatadri, dated 19th January, 1968 and made in S.A. No. 1931 of 1963 preferred to the High Court against the decree of the City Civil Court (Additional Judge), Madras, and passed in A.S. No. 233 of 1961 (O.S. No. 1712 of 1956 City Civil Court (IVth Assistant Judge), Madras).

P. S. Srisailam, for Appellants.

P. V. Subramaniam, for Respondent.

The Judgment of the Court was delivered by

Kailasam, J.—The Union of India owning the South Eastern Railway, represented by the General Manager, Calcutta, is the appellant before us. The respondent filed the suit in the City Civil Court, Madras, for the recovery of a sum of Rs. 3,268-5-4 being the value of goods entrusted to the Railways for carriage and not delivered to him. The case of the plaintiff was that on 1st August, 1955, the plaintiff consigned one case containing perfumes, nibs, pencils and other items of stationery of the value of Rs. 3,861-2-0 from Madras to Howrah by passenger train. The consignment was accepted by the Southern Railway to be carried at Railways' risk. The goods arrived at Howrah on or about

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* L.P.A. No. 74 of 1970. 21st *December*, 1973.

12th August, 1955. When the plaintiff went to take delivery of the goods, he found two planks of the wooden case broken. He demanded open delivery which was accordingly given. It was found that the goods mentioned in the schedule to the plaint of the value of Rs. 3,068-5-4 were short. A certificate of shortage was given. Thereupon the plaintiff laid the claim.

2. Various defences were raised by the defendant. We are not concerned with all of them, except the question whether the appellant - Railways are entitled to claim immunity under section 75 of the Indian Railways Act (IX of 1890), in that the articles that fell under the second Schedule to the Act were not declared by the plaintiff when the parcel was despatched by the Railway.

3. The trial Court found that section 75 of the Act did not apply to the facts of the case and that therefore the Railway was not entitled to protection. According to the trial Judge the Railway had not succeeded in proving that the missing articles had been lost and that therefore they could not claim protection under section 75 of the Act.

4. On appeal by the Railway, the lower Appellate Court, held, on the facts of the case, that the articles missing had been lost within the meaning of section 75 of the Act, and that the Railway was entitled to protection under section 75 of the Act on account of the non-declaration of the value of the goods which admittedly came under the Second Schedule. In this view, it dismissed the suit.

5. The plaintiff took up the matter in second appeal (S.A. No. 1931 of 1963). The learned Judge held that the Railway could seek protection only with regard to the goods that were required to be declared by the plaintiff under the Second Schedule, but were not so declared, and that the consignor was entitled to claim compensation in respect of the short-delivery of the goods which were not required to be declared and insured under the Second Schedule.

6. The present Letters Patent Appeal is filed by the Railway questioning the view of the learned Judge that the protection of the Railway was confined only to the goods that were required to be declared under the Second Schedule and not to the goods that were not required to be so declared.

7. Before we consider the relevant provisions, we may observe that it is common ground that a deal wood box containing perfumes and stationery was despatched by the plaintiff from Madras to Howrah. It is also admitted that so far as the scents are concerned, they have to be declared and insured under the Second Schedule. The plaintiff did not declare the scents under the Second Schedule and take an insurance. When the deal wood box was delivered at Calcutta it was found that the perfumes and articles worth about Rs. 3,268-54 were missing.

8. The despatch of the goods and their delivery at Calcutta were effected before the Amending Act (XXXIX of 1961) came into force. The present case is, therefore, governed by the provisions of the Railways Act (IX of 1890). Section 72 of the Act provided that the responsibility of the Railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by Railway shall, subject to the other provisions of the Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act (IX of 1872). Thus it is clear that the Railway was responsible as a bailee for the loss, destruction or deterioration of the goods delivered to it. Section 75 provided :

> " (1) When any articles mentioned in the Second Schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds three hundred rupees, the Railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package, unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared in writing or declared them in writing at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay in writing a

percentage on the value so declared by way of compensation for increased risk."

9. Before this section could be applied and the Railway could seek protection, it must be proved that certain articles which were covered by the second Schedule and the value of which exceeded three hundred rupees were sent in a parcel or package. There is no dispute that perfumes, one of the articles mentioned in the Second Schedule and whose value was admittedly more than three hundred rupees was not declared and were sent for carriage by the Railway. The learned Counsel for the plaintiff would contend that, even though the articles mentioned in the Second Schedule, over the value of three hundred rupees, were sent in a parcel or package, the liability of the Railway continued, so long as there was no total loss of the parcel or package and that, in any case, the protection of the Railway was confined only to the articles mentioned in the Second Schedule and not to the other articles which were not covered by the Second Schedule.

10. The wording of the section 75 is that, " when any *article* in any parcel or package is lost, destroyed or deteriorated, the Railway administration shall not be responsible for the loss, destruction or deterioration of the *parcel* or *package*." (Italics ours). It may be noted that a clear distinction is drawn between " articles " and " parcel " or " package ". The section contemplates articles being sent in a package ; *i.e.* articles packed in a dealwood box or other container. When the articles required to be declared under the Second Schedule are not properly declared, then the protection that is afforded is for the loss, destruction or deterioration of the parcel or package. The protection is not confined only to the articles that were required to be declared ; the protection covered the entire parcel or package. In this view, the plaintiff could not claim any compensation regarding the articles that were not required to be declared under the Second Schedule. The protection of the Railway extended to the whole of the parcel or package. This was also the view taken by a Bench of the Bombay High Court in *Pundlik Udaji Jadhav* v. *S. M. Railway Company*[1], where the Bench held that the protection given by section 75 of the Act extended to the whole parcel in which silk goods such as were mentioned in the Second Schedule were contained, whether the rest of the parcel was composed of articles mentioned in the Second Schedule or not. The learned Judges observed :

> " There appears from the words of the section which draw a distinction between the articles mentioned in the Schedule and the parcel or package in which they are contained and provides that the Railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package."

11. In *Great Indian Peninsular Railway* v. *Sham Manohar*[2], the Court held that the section clearly showed that the protection afforded by it extended not only to the articles containing tissue and lace (which ought to have been insured), but also to all the other articles contained in the parcels in which the articles first mentioned were placed. The decision of the Bombay High Court in *Pundlik Udaji Jadhav* v. *S. M. Railway Company*[1], was followed.

12. In *East Indian Railway Company* v. *Changa Khan*[3], a Bench of the Calcutta High Court, following *Pundlik Udaji Jadhav* v. *S. M. Railway Company*[1], held that, when a parcel containing goods which were required to be declared as well as goods which were not required to be so declared, was lost, the company was not responsible for any loss, whether it be of goods which were required to be declared or goods which need not have been declared.

With respect, we are in agreement with the view expressed in the decisions referred to above.

13. The other question that was raised was that the loss, destruction or deterioration contemplated by the section should be of the entire parcel or package. Strong

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1. (1909) I.L.R. 33 Bom. 703 : 3 I.C. 964.
2. (1912) I.L.R. 34 All. 422.
3. (1915) 28 I.C. 245.

reliance was placed on the wording of the section, that the railway administration shall not be responsible for the loss, destruction or deterioration of *the* parcel or package (italicised ours). Relying on the use of the word "the", it was contended that the loss, destruction or deterioration must be of the entire parcel or package which contained the articles which were required to be declared and insured under section 75 of the Act. In the context, however, we feel that the loss, destruction or deterioration contemplated in the section of the parcel or package might be either partial or total, so far as the parcel or package was concerned. If we are to construe the section as meaning that the loss should be of the entire parcel or package, it would lead to strange results for, if the package contained, say hundred articles, and if the Railway was able to deliver ninety-nine articles the Railway would not be entitled to protection, but, if the Railway was not able to trace the entire parcel or package, it would be entitled to protection. We do not think that the Legislature intended any such result. Further, we are supported in our view by a decision of a Bench of this Court in *Eagle Star Insurance Company* v. *Moolchand*[1], where, dealing with the contention that section 75 of the Act afforded protection to the Railway only in the case of a total loss of the package, the learned Judges observed:

> "The whole purpose of section 75 is that the Railway should be informed of the special value and therefore of the additional liability the Railway will have to undertake in carrying such goods and in consideration of the additional risk a higher charge is required to be paid. That being the purpose, it will be defeating it, if the risk of the Railway arose only for the entire packet, in the sense that the entire goods had been lost and not merely a part of the goods. In our view sub-sections (1) and (2) of section 75 will cover also partial loss of goods contained in any parcel of package of the specified type."

14. On a considerations of the section, we are satisfied that the protection afforded thereunder would cover even a partial loss of the parcel or package. In this view, we are unable to agree with the conclusion arrived at by the learned Judge.

15. Before we conclude, we would refer to a decision of a single Judge of this Court in *Union of India owning the Eastern Railway by its General Manager, Calcutta* v. *Jetmall Sukanraj*[1]. Relying on this decision, the learned Counsel for the plaintiff contended that the claim was only for non-delivery of goods and that, so far as non-delivery was concerned, the protection given to the Railway for loss, destruction or deterioration was not available. That decision is not relevant for our purpose, because it dealt with the provisions under the Amended Act XXXIX of 1961, where the relevant provisions have been recast. Under section 73 of the Amended Act, while the Railway is made responsible for any loss, destruction, damage or deterioration or non-delivery, in transit, of animals or goods delivered to the administration to be carried by railway, the protection to the railway in cases where the goods required to be declared under the Second Schedule have not been declared is restricted only to the loss, destruction, damage or deterioration of the parcel or package, the protection not having been given to non-delivery of goods in transit. As the Railway can claim protection only under section 77-B, it will have to establish that the goods contained in the parcel or package were lost, destroyed, damaged or deteriorated. If the Railway does not come within the proection afforded by section 77-B, the claim for compensation cannot be resisted. The question whether the Railway would be liable for 'non-delivery of goods, in transit' and whether the goods were lost, destroyed, damaged or deteriorated, would depend upon the facts of the case. It may be that in respect of non-delivery in transit, the Railway would not be entitled to protection under section 77-B, but non-delivery may be due to loss, destruction, damage or deterioration of the parcel or package, in which case the protection under section 77-B, would be available. We are not, however, pursuing this matter, as it does not arise in the present case.

1. (1965) 2 M.L.J. 460.

1. (1971) 2 M.L.J. 257.

16. In the result, the Letters Patent Appeal is allowed, but, under the circumstances of the case, without costs.

R.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

Narayanan .. *Appellant**

v.

Kannabiran Mudaliar and another .. *Respondents.*

Provincial Insolvency Act (V of 1920), sections 4, 68 and 3—Auction by Official Receiver —When can be set aside—Section 3—Gazette Notification — Effect — Sub-ordinate Courts established subsequently also covered.

Under section 68 of the Provincial Insolvency Act the sale by an Official Receiver should not be set aside unless there are good grounds for interfering with the discretion exercised by the Official Receiver. The Court must act on judicial grounds in setting aside the sale. The grounds on which the sale may be set aside are fraud, collusion between the Receiver and the insolvent or the intending purchaser, and irregularities in the conduct of sale. Though there may be no collusion or fraud, even then the sale can be set aside on the ground that the sale is for low price. [*Para.* 2.]

G.O. Ms. No. 1731, dated 5th June, 1924 is an omnibus G.O. which confers insolvency jurisdiction upon all Sub-Courts in the State of Madras. All Subordinate Courts in the State existing or to come into existence in future are vested with insolvency jurisdiction. [*Para.* 6.]

In the present case, since the auction was found to have been conducted by the official receiver without any notice to the petitioning creditor and the price fetched was unduly low, the sale was liable to be set aside.

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* A.A.O. No. 39 of 1972.

8th February, 1974.

Case referred to :—

Srinivasa Naicker v. *Engammal,* A.I.R. 1962 S.C. 1141.

Appeal against the order of the District Court of Chingleput, dated 18th November, 1971 and made in C.M. A. No. 41 of 1970 (I.A. No. 2 of 1970 in I.P. No. 1 of 1953 on the file of the Court of the Subordinate Judge of Kancheepuram).

R. Sundaravaradan, for Appellant.

P. Veeraraghavan, for Respondents.

The Court made the following

ORDER.—The appellant is the purchaser of certain properties from the Official Receiver of Chingleput who held on 16th April, 1968 an auction sale of the properties of the insolvent in I.P. No. 1 of 1953 on the file of the Sub-Court, Chingleput. The first respondent herein, who is the son and legal representative of one of the petitioning creditors (since dead), filed a petition under sections 4 to 6 and 68 of the Provincial Insolvency Act to set aside the sale. This was opposed by the Official Receiver and by the appellant, the purchaser. The learned Subordinate Judge, Kanchipuram, after an elaborate discussion of the evidence adduced by the parties, set aside the sale on the ground that the auction sale had been conducted by the Official Receiver without any notice to the petitioning creditor and that the price fetched at the Official Receiver's auction was unduly low. Against the order of the Subordinate Judge, the appellant preferred C.M.A. No. 41 of 1970 on the file of the District Judge, Chingleput. The learned District Judge, upon a review of the evidence held that the trial Court was perfectly justified in setting aside the sale, inasmuch as no notice of auction had been issued by the Official Receiver to the creditors and the price fetched at the auction for the properties and that, too, in favour of the husband of the grand-daughter of the insolvent was too very low. Upon this finding, the first appellate Court dismissed the appeal with costs. It is against that judgment that the present appeal has been filed.

2. Before going into the merits of the case, I think it right to refer to the ruling of the Supreme Court reported in *Srinivasa*

Naicker v. *Engammal*[1] in which the power of the Court under section 68 of the Provincial Insolvency Act and the limitations upon that power have been discussed. Their Lordships observed at page 1143 as follows :

" It may be accepted that the power of the Court under section 68 is not hedged in by those considerations which apply in cases of auction sales in execution proceedings. Even so, the power under section 68 is a judicial power and must be exercised on well recognised principles, justifying interference with an act of the receiver, which he is empowered to do under section 59 (*a*) of the Act. The fact that the act of the receiver in selling properties under section 59 (*a*) is subject to the control of the Court under section 68 does not mean that the Court can arbitrarily set aside a sale decided upon by the Official Receiver. It is true that the Court has to look in insolvency proceedings to the interest in the first place of the general body of creditors ; in the second place, to the interest of the insolvent, and lastly, where a sale has been decided upon by the Official Receiver, to the interest of the intending purchaser, in that order. Even so, the decision of the Offiical Receiver in favour of a sale should not be set aside unless there are good grounds for interfering with the discretion exercised by the Official Receiver. These grounds may be wider than the grounds envisaged, in auction sales in execution proceedings. Even so, there must be judicial grounds on which the Court will act in setting aside the sale decided upon by the Official Receiver. These grounds may be, for example, that there was fraud or collusion between the receiver and the insolvent or the intending purchaser ; the Court may also interfere if it is of opinion that there were irregularities in the conduct of the sale which might have affected the price fetched at the sale ; again, even though there may be no collusion, fraud or irregularity, the price fetched may still be so low as to justify the Court to hold that the property should not be sold at that price. These grounds and similar other grounds depending upon particular circumstances of each case may justify a Court in interfering with the act of the Official Receiver in the case of a sale by him under section 59 (*a*) of the Act."

3. Applying the principles laid down by their Lordships and testing the sale in this case in the light of those principles, I have little hesitation in holding that both the Subordinate Judge and the District Judge were right in setting aside the sale in question. Be it noted that the insolvent Kuppuswami Naidu and his brothers were adjudged insolvents in this case on a creditor's petition filed by three persons, one of whom was the deceased father of Kannabiran Mudaliar who filed M.P. No. 345 1968 to set aside the sale and was a major creditor to whom more than Rs. 15,000 was due by the insolvent. He was therefore, vitally interested in seeing that the properties of the insolvent fetched the highest possible price, so that out of the sale proceeds thereof, the largest amount of dividend could be declared in favour of the general body of creditors. Curiously enough, the Official Receiver, who held the auction sale, sent no notice whatsoever of the date of sale to the petitioning creditor. The Official Receiver does not, in his counter, deny the averment in M.P. No. 345 of 1968 that the properties were sold without any notice to Kannabiran Mudaliar or his father. This is all the more strange in view of the fact that an earlier sale conducted by the Official Receiver was set aside on an application filed by one K. M. Ramaswami and a resale was ordered by the insolvency Court. As per the rules contained in the circular orders issued by the High Court and published at page 258 of the Civil Rules of Practice and Circular Orders, Volume 1 (1941 Edition), in auction sales held by the Official Receivers the right to adjourn an auction should always be reserved if there are not sufficient bidders or if the highest bid is not adequate. According to another rule printed at the same page, when a sale is adjourned for more than a month, there ought to be a fresh proclamation and if no fresh proclamation is made, a tleast there ought to be notice to the creditors. There ought to be something to convince one that the amount realized at the sale

1. A.I.R. 1962 S.C. 1141.

did not suffer a diminution for want of publicity of the adjourned date.

4. Now, in this case, the properties sold constituted the insolvent's 7/12th share in a house bearing Door No. 9, Apparao Mudali Street, Kanchipuram, and in the land measuring 23 acres 52 cents in Koneri Kuppam Village. The house is said to have fetched a price of Rs. 4,060 and the land, a sum of Rs. 5,550. It is significant that the purchaser of these two properties was no other than the husband of the grand-daughter of the insolvent himself. He lives 50 miles away from Kanchipuram and it is intriguing that while the petitioning creditors were not apprised of the auction held by the Receiver, this man, who lives 50 miles away from Kanchipuram, should have got scent of this sale and offered bid at the auction. It has been alleged in the petition that the sale itself is the result of fraud and collusion between the insolvent and the purchaser and that the sale has been effected solely to benefit the insolvent. This allegation appears to have been substantiated by proof of the close relationship between the purchaser and the insolvent and the failure on the part of the Receiver to give due publicity to the sale. One other circumstance, which has weighed with both the Courts below, is that the auction has fetched not even half the market-value of the properties. According to R.W. 1, the purchaser himself, the prevailing market value of the land is between Rs. 30 and Rs. 40 per cent. P.W. 1's evidence is that there is a well and pump set worth Rs. 5,000 in this land and that at the time of the sale, the 7/12th share of the insolvent in the land would be worth Rs. 12,000. If we take the valuation given by R.W. 1, it would come to much more than Rs. 12,000. As for the house, the total extent of the site upon which the house stands is 38′ X 200′ and the built-in area is 38′ X 120′. In the petition, it has been alleged that the house is worth not less than Rs. 7,500. Both these properties together have been sold for Rs. 9,500 in favour of the appellant. Having regard to the context in which, and the person to whom, the sale had been effected both the Courts below held that the price fetched at the auction held by the Official Receiver was excessively low. In fact, the petitioner before the first Court offered to purchase the properties for Rs. 20,000, that is to say, for more than double the amount for which the Official Receiver has actually sold the same to the appellant. In these circumstances, I do not think that the concurrent judgments of the Courts below can be regarded as being contrary to law. On the other hand, I think the grounds upon which the Courts below decided to set aside the sale are quite sound and acceptable.

5. One other contention raised by the appellant is that the Kanchipuram Sub-Court had no jurisdiction at all to entertain the petition to set aside the sale. The I. P. seems to have been filed originally in Chingleput Sub-Court. But after the Sub-Court at Kanchipuram was established the records of cases relating to the area over which the newly established Sub-Court would have territorial jurisdiction were transferred by the District Judge to the Kanchipuram Sub-Court. Learned Counsel for the appellant, who did not raise any objection as regards jurisdiction either before the Sub-Court or before the first appellate Court has, however, raised this objection in this Court. Section 3 of the Provincial Insolvency Act provides that the District Court shall be the Court having jurisdiction under the Act, provided that the State Government may, by notification in the Official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of cases and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act. The Sub-Court at Kanchipuram came into existence by virtue of G.O. Ms. No. 2505, Home Department, dated 6th October, 1969. By G.O. Ms. No. 1731, dated 5th June, 1924 of the Law (General) Department, the following notification was published in the Fort St. George Gazette;

> "In exercise of the powers conferred by the proviso to the sub-section (1) of section 3 of the Provincial Insolvency Act (V of 1920) the local Government are pleased to invest all Courts of subordinate judges in the Presidency with jurisdiction under the said Act, in respect of all cases of petitions presented by creditors."

6. This is an omnibus G.O. which confers insolvency jurisdiction upon all Sub-Courts in the State of Madras. The argument of the learned Counsel for the appellant is that it could confer jurisdiction only upon such Sub-Courts as were in existence on the date of the G.O., namely 5th June, 1924. I am unable to agree. It invests all Courts of Subordinate Judges in the State, existing or to come into existence in future, with insolvency jurisdiction. The moment the Kanchipuram Sub-Court came into existence, this G.O. operated to confer upon that Court the insolvency jurisdiction, which every other Sub-Court in the State had been invested with under the G.O. I therefore reject this objection relating to jurisdiction as not tenable.

7. The result is that the appeal fails and will stand dismissed. No costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Natarajan, JJ.*

The Commissioner, Hindu Religious and Charitable Endowments, Madras with his office at Madras. *Appellant**

v.

V. Krishnaswami and another .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 11 *and Order* 9, *rule* 9—*Plea of* res judicata—*Requirements—Bar under Order* 9, *rule* 9—*Nature of defence based on—May be waived.*

For the bar of *res judicata* to operate the former decision on the basis of which the doctrine is invoked must be one where the matter directly and substantially in issue in the latter action had been directly and substantially in issue in the former action as well, the action must have been between the same parties or between parties under whom they or any of them claim, they should have litigated under the same title, the litigation should have been in a Court competent to try such subsequent suit and the former decision had been rendered after the issue had been heard and finally decided by such Court. [*Para.* 12.]

Unless all the essential features mentioned in section 11, Civil Procedure Code, are present in the earlier order, which is sought to be pressed into service to invoke the doctrine of *res judicata* the contend r cannot be heard to say that the former decision must prevail over the later action as well. [*Para.* 12.]

The doctrine of *res judicata* is not confined to a decision in a suit but it applies to decisions in other proceedings as well. [*Para.* 10.]

Even as in the case of *res judicata*, a defence in respect of an action under Order 9, rule 9, Civil Procedure Code, is not an inexorable or inflexible defence in the sense that such a defence can be invoked as an answer to a claim made by a party in an action at any stage of the proceedings and the invoking of such a defence cannot be trammelled by any other rule of law. Of necessity the application of such doctrine of defence must have relevancy to the conduct of parties and cannot be worked out in vacuum. [*Para.* 15.]

A plea under Order 9, rule 9, is one which a party can waive. Having invited the Court to render a decision on merits it will be most inequitable if a party is allowed to fall back upon a technical plea and oppose an action of the other party when such a plea was wholly available to him even at the very inception of the action and which plea he failed to put forward and instead chose to hazard a decision of the case on merits. [*Para.* 16.]

Cases referred to :

Bhavanarayanaswamivari Temple v. *Bhavanarayanacharyulu*, (1971) 1 M.L.J. (S.C.) 49; *Shivashankar* v. *Baikunth*, (1970) 1 S.C.J. 101 : (1969) 3 S.C.R. 908 : A.I.R. 1969 S.C. 971 ; *Chenniappa Mudaliar* v. *Commissioner of Income-tax, Madras*, (1964) 2 M.L.J. 157 : 53 I.T.R. 323 : (1964) 2 I.T.J. 148: 77 L.W. 441: I.L.R. (1964) 2 Mad. 787: A.I.R. 1965 Mad. 62 ; *Moturi Seshayya* v. *Sri Rajah Venkatadri Appa Rao*, (1916) 31 M.L.J. 219 : 36 I.C. 289.

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* Appeal No. 502 of 1968. *7th March,* 1974.

Appeal against the decree of the Court of the Subordinate Judge, Dindigul, dated 15th March, 1968 and passed in O.S. No. 10 of 1968.

The Additional Government Pleader, for Appellant.

S. Tyagaraja Iyer, for Respondents.

The Judgment of the Court was delivered by

Natarajan, J.—The Commissioner, Hindu Religious and Charitable Endowments, Madras, the 1st defendant in O.S. No. 10 of 1965 on the file of the Court of the Subordinate Judge, Dindigul, is the appellant. The controversy in the suit instituted by the plaintiff related to the office of hereditary trustee of Sri Kaliamman temple situate in Andipatti village in Periakulam Taluk.

2. The case of the plaintiff was that the Sri Kaliamman Temple, which was an ancient institution was always being managed by a hereditary trustee and that it was the family of the plaintiff which was managing the temple and its affairs as hereditary trustee for a long number of years. According to the plaintiff his great-grandfather was originally managing the temple as hereditary trustee and after him the plaintiff's grandfather Perumal Naicker was in management and after his grandfather's time the plaintiff's father Velappa Naicker was managing the affairs of the temple as hereditary trustee for about 40 years. It was the further case of the plaintiff that after his father's death he took over the management of the temple as hereditary trustee and has been in uninterrupted management of the same for very many years. In the year 1939 the temple was declared to be an excepted temple by the Hindu Religious and Charitable Endowments Board and while deciding the character of the temple the Board had also determined the nature of the office of the trustee and had accepted the holding of the office of trustee by the plaintiff as one done in the exercise of his vested right as hereditary trustee. According to the plaintiff when this was the settled state of affairs the Area Committee of Madurai, without any notice or intimation to him, appointed the 2nd defendant in the suit as a non-hereditary trustee and this fact came to be known to the plaintiff only when the 2nd defendant took steps through the Area Committee to obtain possession of the temple and the temple properties from the plaintiff. At once the plaintiff sought the intervention of the Deputy Commissioner, Hindu Religious and Charitable Endowments Board, Madurai and prayed that no certificate for possession of the temple and its properties should be granted in favour of the 2nd defendant. The Deputy Commissioner however disregarded the plea of the plaintiff and issued a certificate in favour of the 2nd defendant on 21st October, 1963. This led to the plaintiff filing an application O.A. No. 59 of 1960 before the Deputy Commissioner for assailing the appointment of the 2nd defendant as a non-hereditary trustee by the Area Committee when the plaintiff was admittedly in possession of the temple and its properties in the capacity of hereditary trustee and when such rights had already been recognised as early as 1939. On the Deputy Commissioner refusing to intercede in the matter and dismissing the application of the plaintiff he preferred an appeal to the Commissioner but the appeal also did not meet with success. It was thereafter the plaintiff came forward with the suit O.S. No. 10 of 1965 and prayed for a declaration that he was the hereditary trustee of Sri Kaliamman temple and for having the order of the Commissioner, dated 28th October, 1964 in A.S. No. 6 of 1964 set aside.

3. The 1st defendant resisted the suit of the plaintiff and contended that he did not accept the contention of the plaintiff that the plaintiff's fore-fathers and the plaintiff had been in management of the temple for a long number of years in their capacity as hereditary trustees. It was averred by the 1st defendant that the records went to establish that in addition to the plaintiff's father Velappa Naicker two other persons by name Muthalagu Pillai and Arunachalam Chettiar had also functioned as trustees in respect of the temple and as such the claim of the plaintiff that his father had been solely in management of the temple as hereditary trustee was not tenable. The 1st defendant therefore contended that the Area Committee was well within the rights in having appointed and 2nd

defendant as a non-hereditary trustee and that the plaintiff was not entitled to question the appointment of the 2nd defendant. Yet another defence that was taken by the 1st defendant was that on a former occasion the plaintiff had attempted to get a declaration from the Deputy Commissioner, Tanjore, of the hereditary nature of his office of trusteeship and had failed therein and as such the order passed by the Deputy Commissioner in those proceedings had become final. It was therefore urged by the 1st defendant that the plaintiff was estopped from traversing covered ground once again and that the suit instituted by him was barred by *res judicata.*

4. In a separate written statement the 2nd defendant also opposed the claim of the plaintiff to be entitled to act as the hereditary trustee of the temple. The 2nd defendant averred that the management of the temple had always been vested in the representatives of the three communities of Pillaimars, Chettiars and Naickers, that the periathanakaras of each of the communities had always been managing the affairs of the temple jointly with each other and that therefore the claim of the plaintiff that he and his forefathers had been in exclusive management of the temple as hereditary trustees was not a genuine claim. The 2nd defendant also contended that the prior action of the Board in having recognised the temple as an excepted one had nothing to do with the question as to whether the office of trustee attached to the temple was a hereditary or non-hereditary one and that therefore the plaintiff was not entitled to sustain his claim for the hereditary trusteeship of the temple on the earlier decision of the Board accepting the temple to be an excepted institution.

5. On the pleadings of the parties, the learned Subordinte Judge set the following issues for trial :

1. Whether the plaintiff is the hereditary trustee of the suit temple ?

2. Whether the order of the Board, dated 31st July, 1939 is final and binding on the Commissioner ?

3. Whether the suit is barred by *res judicata* by reason of dismissal of the plaintiff's petition before the Deputy Commissioner, Tanjore ?

4. Whether the order appointing 2nd defendant is not legal and valid ?

5. Whether the plaintiff is entitled to the declaration prayed for ?

6. To what relief, if any, is the plaintiff entitled ?

6. After a consideration of the evidence adduced by both sides the learned Subordinate Judge held that the earlier order of the Board — Exhibit A-4 holding the temple to be an excepted temple did not estop the Commissioner from going into the question as to whether the office of trusteeship of the temple was hereditary or non-hereditary and accordingly found issue No. 2 against the plaintiff. As regards issue No. 1 the learned Subordinate Judge found that there was a large volume of acceptable evidence in support of the plaintiff's claim that he was a hereditary trustee of the temple and therefore found this issue in favour of the plaintiff. With reference to issue No. 3 the learned Subordinate Judge held that the prior proceedings instituted by the plaintiff before the Deputy Commissioner, Tanjore which resulted in an order of dismissal against the plaintiff did not operate as *res judicata* so as to disentitle the plaintiff from instituting his present action. In view of his conclusions on issues Nos. 1 and 3 the learned Subordinte Judge held on issues Nos. 4 and 5 that the order appointing the 2nd defendant as non-hereditary trustee was not legal and that therefore the plaintiff was entitled to a declaration in his favour as prayed for. He therefore gave a decree in favour of the plaintiff and it is as against that judgment and decree the 1st defendant has come forward with this appeal.

7. The two material questions that arise for consideration in this appeal are — whether the plaintiff has established that he and his forefathers had been managing the affairs of the temple as hereditary trustees ; and whether the prior proceedings before the Deputy Commissioner, Tanjore, disentitle the plaintiff in any manner from instituting the suit for a declaration of his right as hereditary trustee. As far as the first point is con-

cerned, the plaintiff has placed reliance upon not only his evidence but also on the evidence of the two other witnesses — P.Ws. 2 and 3 to prove that he and before him his father, grandfather and great-grandfather were continuously managing the affairs of the temple and that they exercised such rights by virtue of their being the hereditary trustees of the temple. As P. W. 1 the plaintiff has stated that his father Velappa Naicker was functioning as the trustee of the temple for about 40 years and that after the death of his father he was managing the affairs of the temple all along and that his management had not been questioned by anyone. He has also deposed that before his father, his grandfather Perumal Naicker and before him his great-grandfather Beri Naicker had functioned as trustee of the temple. P.W. 2, a resident of the Andipatty village, aged about 80 years, has fully supported the case of the plaintiff and has stated that Beri Naicker the great-grandfather of the plaintiff was the trustee of the temple for about 5 years and that after his life-time his son Perumal Naicker functioned as trustee for a period of 20 years and after him the plaintiff's father Velappa Naicker was managing the affairs of the temple as trustee for about 40 years. He has further stated that Arunachalam Pillai and Karuppanan Chettiar who were associated with Perumal Naicker in the management of the temple did not participate in the management in the capacity of hereditary trustees but only lent their assistance to the managing trustee at his request. The third witness examined of the side of the plaintiff, *viz.*, P.W. 3 has also supported the plaintiff in full measure. He claims to have been a lessee in one of the shops belonging to Sri Kaliamman temple and he has stated that he was personally aware of the plaintiff's grandfather managing the affairs of the temple as trustee during his lifetime and that after him his son Velappa Naicker and after Velappa Naicker the plaintiff were successively looking after the affairs of the temple. P.Ws. 2 and 3 have both stated that the office of trusteeship was automatically assumed by the members of the plaintiff's family after the death of the last office-holder and that they were not elected to the office or appointed to that office by anyone. Nothing has been elicited in the cross-examination of P.Ws. 2 and 3 which would show that they are not trustworthy or credible witnesses or that they are giving interested evidence in favour of the plaintiff to oblige him. As against the evidence of P.Ws. 1 to 3 the defendants have placed reliance upon the evidence of their sole witness — D.W. 1 Sivagaminatha Nadar. D.W. 1 has attempted to say that the temple was not managed by Velappa Naicker alone but only in association with two others, Karuppanan Chettiar and Arunachalam Pillai and that the jewels and cash belonging to the temple were kept in the shop of one Periakaruppan Nadar, where D.W. 1 claims to have worked as an Accountant. He has however been forced to admit in cross-examination that Perumal Naicker, Velappa Naicker and the plaintiff have been holding the office of the trustee of the temple in succession and that their holding of such office was not questioned by anyone. If really the plaintiff and his ancestors were not holding the office as hereditary trustees it is inconceivable that they would have assumed that office in succession without there being an election to that office from among the residents of the village where the temple is situated.

8. The documentary evidence adduced by the plaintiff also establishes his case that he and his forefathers were managing the temple and its affairs as hereditary trustees without let or hindrance for a long number of years. Exhibit A-2 is a register maintained under section 38 of Act II of 1927 wherein the names of the past and present trustees have to be shown and details have also to be furnished as regards the custom if any in regard to the succession of the office of trustee, the jewels belonging to the institution, the particulars of all endowments made in favour of a Mutt or temple and also the scheme of administration, if any, framed in respect of that institution. Such a register is subject to scrutiny by the Board. The entries contained therein have been scrutinised and verified by a special Inspector of the Board and have been countersigned by the Assistant Commissioner, Hindu Religious and Charitable Endowments. Though the names of three persons have been entered in the register as persons exercising the

office of trustee in respect of the temple, namely, Velappa Naicker, Arunachalam Pillai and Karuppanan Chettiar, it is seen at page 3 of the register that the temple has been declared as an excepted temple. There is also an entry in regard to succession to the office of trustee and that entry makes it clear that the office has been classified as a hereditary office. Yet another document which clinchingly proves the case of the plaintiff is Exhibit A-3 which is an audited report regarding the accounts of that temple. The said report has been prepared by one Dhakshinamoorthy, an audit clerk and has been countersigned by the District Inspector of Hindu Religious and Charitable Endowment Department (Accounts) Madurai. The very first sentence in the report runs thus :

> " The office of hereditary trustee was held by Sri P. Velappa Naicker during the fasli under report."

9. Exhibit A-5 series are receipts showing the payment towards the contribution and audit fees and they are made in the name of plaintiff's father Velappa Naicker. Exhibit A-6 is a memo. by the Assistant Commissioner addressed to Velappa Naicker as managing trustee of the temple. So also Exhibits A-7, A-8 and A-9, which are all communications from the Assistant Commissioner addressed to Velappa Naicker as the trustee in charge of the affairs of Sri Kaliamman temple. It is thus seen that there is a preponderance of evidence, both oral and documentary in support of the case of the plaintiff that his forefathers during their life-time have been in charge of the affairs of the temple as hereditary trustees. It is in view of such overwhelming evidence in support of the plaintiff's case that Thiru Kumaraswami, the learned Assistant Government Pleader appearing for the appellant, did not, and in our opinion, rightly, rest the case of the 1st defendant on any criticism regarding the merits of the contention of the plaintiff that he is entitled to hold office as hereditary trustee of the temple, but instead chose to assail the judgment of the learned Subordinate Judge on the technical ground that the plaintiff, by reason of the adverse decision against him in the prior proceedings instituted by him before the Deputy Commissioner, Tanjore, was disentitled from instituting a fresh suit for a declaration of his right to be the hereditary trustee of the temple. This takes us to the second point which, as we have already stated, arises for consideration in the appeal.

10. To appreciate the argument of Thiru Kumaraswami, it is necessary to make reference to the prior proceedings which were instituted by the plaintiff before the Deputy Commissioner, Tanjore. The sheet-anchor of the 1st defendant's case in this behalf is the two documents —Exhibits B-6 and B-7. Exhibit B-6 is the application made by the plaintiff to the Deputy Commissioner, Tanjore praying for an order in his favour declaring him the hereditary trustee of the Sri Kaliamman temple. It is not known under what circumstances the plaintiff made this application. He has however stated therein that his forefathers, generation after generation, were the hereditary trustees of the temple, that he himself from the time of his father's death in 1953 had been in possession and management of all the properties of the temple and that as per the directions of the Assistant Commissioner, Madurai, he was making that application to the Deputy Commissioner for a declaration that he was entitled to hold office as hereditary trustee of the temple. The plaintiff has specifically stated therein that there was no respondent to be impleaded in the application. Though the plaintiff had made such an application he does not appear to have pursued it as is made clear by the order of the Deputy Commissioner in Exhibit B-7. Exhibit B-7 reads as follows :—

> " This case having come on for final hearing on 1st August, 1957, in the presence of Sri R. Pechimuthu Pillai, one of the objectors and the applicant having been absent and having stood over for consideration to this day, the Deputy Commissioner after considering all the materials placed before him passes the following order.
>
> The application be and is hereby dismissed.
>
> A. Sakkarai, Deputy Commissioner.

Placing reliance upon this order the

contention of Thiru Kumaraswami is that inasmuch as this pronouncement by the Deputy Commissioner had become final, the plaintiff is barred by *res judicata* from instituting a fresh action in respect of the same relief. In order to contend that the principle, of *res judicata* enunciated in section 11, Civil Procedure Code, is not confined to suits alone, but has a wider application and will be attracted to all matters which come up before a Tribunal for decision, Thiru Kumaraswami places reliance on the decision of the Supreme Court in *Bhavanarayanaswamivari Temple* v. *Bhavanarayanacharyulu*[1]. It has been stated therein that the doctrine of *res judicata* is not confined to a decision in a suit but it applies to decisions in other proceedings as well.

11. To meet this argument of Thiru Kumaraswami, Thiru R. Sundaralingam, the learned Counsel for the plaintiff would contend that the order passed under Exhibit B-7 is not one passed on merits and consequently one of the fundamental and pre-requisite features for the application of the doctrine of *res judicata* is not satisfied and therefore the 1st defendant is not entitled to flourish Exhibit B-7 against the plaintiff and contend that the plaintiff's suit is barred by *res judicata*.

12. On a consideration of the matter, we find that there is considerable force in the stand taken by Thiru Sundaralingam. It is needless for us to say that if the doctrine of *res judicata* is to be held attracted to an action so as to disentitle the party instituting the action from claiming any relief thereunder, the former decision on the basis of which the doctrine of *res judicata* is invoked must be one where the matter directly and substantially in issue in the latter action had been directly and substantially in issue in the former action as well, that the action must have been between the same parties or between parties under whom they or any of them claim, that they should have litigated under the same title, that the litigation should have been in a Court competent to try such subsequent suit and that the former decision had been rendered after the issue had been heard and finally decided by such Court. We do not find anything in Exhibit B-7 to warrant the conclusion that the Deputy Commissioner who passed that order heard the matter in full and rendered his decision on merits. Though a a reference is made to an objection filed by one of the objectors to the petition the order itself does not disclose that the Deputy Commissioner applied his mind to the objections raised by the objector and after due consideration of the said objections he passed the order against the plaintiff on merits and dismissed his application. Unless all the essential features which are made mention of in section 11, Civil Procedure Code, are found to exist in the earlier order, which is sought to be pressed into service to invoke the doctrine of *res judicata*, the contender cannot be heard to say that the former decision must prevail over the later action as well.

13. As a matter of fact, the Supreme Court itself has held in the case referred to above *Bhavanarayanaswamivari Temple* v. *Bhavanarayanacharyulu*[1], that the question as to how far a decision which is rendered in other proceedings will bind the parties depends upon other considerations, one of which will be whether that decision determines substantial rights of parties and the other is whether the parties were given adequate opportunities to establish the rights pleaded by them.

14. We may also refer to another decision of the Supreme Court in *Shivashankar* v. *Baikunth*[2], wherein it has been held that before a plea can be held to be barred by *res judicata* that plea must have been heard and determined by the Court. In *Chenniappa Mudaliar* v. *Commissioner of Income-tax, Madras*[3], a Full Bench of this Court has held, while dealing with a matter which arose under the Income-tax Act, that the dismissal of a case for default can in no sense amount to as adjudication on its merits, quite unlike a case of *ex parte* decision, where there is an adjudication on the merits and that the former cannot operate as *res judicata* while the latter would. We are therefore

1. (1971) 1 M.L.J. (S.C.) 49.

1. (1971) 1 M.L.J. (S.C.) 49.
2. (1970) 1 S.C.J. 101 : (1969) 3 S.C.R. 908 : A.I.R. 1969 S.C. 971.
3. (1964) 2 I.T.J. 148 : I.L.R. (1964) 2 Mad. 787 : 77 L.W. 441 : (1964) 2 M.L.J. 157 : 53 I.T.R. 323 : A.I.R. 1965 Mad. 62.

unable to accept the contention of Thiru Kumaraswami that the order in Exhibit B-7 would operate as *res judicata* to the suit instituted by the plaintiff.

15. Thiru Kumaraswami, would however contend that even if Exhibit B-7 does not operate as *res judicata* it would nevertheless debar the plaintiff from instituting the present action by reason of the provisions contained in Order 9, rule 9, Civil Procedure Code. His contention is that inasmuch as the plaintiff failed to appear before the Deputy Commissioner on the hearing day while the objector to the petition was present, the plaintiff, in view of the salutary principle of law laid down in Order 9, rule 9, Civil Procedure Code, is precluded from bringing a fresh action in respect of the same matter and that as long as the order passed under Exhibit B-7 did not stand set aside the plaintiff will have no right to file a fresh action in respect of the same relief. Even with regard to this contention we are unable to agree with Thiru Kumaraswami. Though the Deputy Commissioner had dismissed the application of the plaintiff Exhibit B-6 by his order Exhibit B-7 the said order does not seem to have been acted upon at all. No steps had been taken by the Deputy Commissioner to wrest the management of the temple from the plaintiff and entrust it in the hands of persons appointed by the Board. Even the objector who would not consent to the plaintiff getting an order in his favour declaring him to be the hereditary trustee of the temple does not appear to have taken any action to enforce the order passed in Exhibit B-7. From the records filed as exhibits in the case it is seen that the plaintiff has continued to function as the trustee of the temple and managed its affairs all along. As a matter of fact, the Board itself has called for contribution from the plaintiff in respect of the suit temple even subsequent to the order under Exhibit B-7. This is manifested by the demand notice Exhibit A-10 dated 17th May, 1958 and the reminder notice Exhibit A-11 dated 6th August, 1959. Over and above all these things it is seen that when the plaintiff came forward with his application O.A. No. 59/60 before the Deputy Commissioner the Board did not take the stand that by reason of the former order under Exhibit B-7 rejecting the claim of the plaintiff to function as the hereditary trustee of the temple he was not entitled to seek a fresh declaration from the Deputy Commissioner. Even so, the Commissioner also in the appeal preferred before him did not consider the question as to whether the former decision against the plaintiff disentitled him from seeking for a similar relief in his favour. This defence, *viz.*, that Exhibit B-7 stood in the way of the plaintiff seeking a fresh declaration in his favour was raised for the first time only when the 1st defendant filed his written statement in the suit filed by the plaintiff. Even as in the case of *res judicata* a defence in respect of an action under Order 9, rule 9, Civil Procedure Code, is not an inexorable or inflexible defence in the sense that such a defence can be invoked as an answer to a claim made by a party in an action at any stage of the proceedings and that the invoking of such a defence cannot be trammelled by any other rule of law. Of necessity the application of such doctrines of defence must have relevancy to the conduct of parties and cannot be worked out in vacuum. Inasmuch as the Deputy Commissioner and the 1st defendant had failed to treat Exhibit B-7 as a bar to the subsequent action instituted by the plaintiff, it must be held that they had waived such a defence and if they had so waived, it will not be open to them to raise that objection at a later stage, *i.e.*, when the plaintiff came forward with the suit.

16. A Bench of this Court in *Moturi Seshayya* v. *Sri Rajah Venkatadri Appa Row*[1], has held that the plea of *res judicata* is one which does not affect the jurisdiction of the Court and it is only a plea in bar of a trial of a suit or an issue as the case may be, which a party is at liberty to waive. Even so in respect of a plea under Order 9, rule 9, Civil Procedure Code, it is one which a party can choose to waive and defend a later action on the strength of his case and on the merits of the controversy. Having invited the Court to render a decision on merits it will be most inequitable of the party is allowed to fall back upon a

1. (1916) 31 M.L.J. 219 : 36 I.C. 289.

technical plea and oppose an action of the other party when such a plea was wholly available to him even at the very inception of the action and which plea he failed to put forward and instead chose to hazard a decision of the case on merits. We are therefore clearly of the opinion that the further contention of Thiru Kumaraswami, that even if Exhibit B-7 will not operate as *res judicata* to the suit instituted by the plaintiff, it would nevertheless preclude the plaintiff, under Order 9, rule 9, Civil Procedure Code, from coming forward with the action cannot be sustained. The resultant position will therefore be that the plaintiff succeeds on both the points which arise for consideration in appeal. In the result, we find that the appeal is devoid of merit. Consequently the appeal will stand dismissed. There will be no order as to costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

M. Ramachandran and others .. *Appellants**

v.

State of Madras represented by the Collector of Coimbatore .. *Respondent.*

Madras Requisitioning and Acquisition of Immoveable Property Act (XLII of 1956), *sections* 8 *and* 11—*Madras Court-fees and Suits Valuation Act (XIV of* 1955), *s ction* 51—*Award—Nature of—" Order " as contemplated by section* 51—*Appeal under section* 11—*The Madras Act of* 1956—*Court-fee payable—Section and Article applicable.*

An award made by an arbitrator under section 8 of the Madras Requisitioning and Acquisition of Immoveable Property Act, 1956, is not a mere expression of opinion but an " order ", a formal expression of a decision regarding the compensation to be paid. It is not necessary that there should be a direction or command to make an award an " order " as contemplated under section 51 of the Madras Court-fees and Suits Valuation Act, 1958. [*Para.* 3.]

The award of the Arbitrator under section 8 of the Madras Requisitioning and Acquisition of Immoveable Property Act is " an order relating to compensation under any Act " as contemplated in section 51 of the Madras Court-fees and Suits Valuation Act. [*Para.* 2.]

An appeal under section 11 of the Madras Requisitioning and Acquisition of Immoveable Property Act of 1956, against an order relating to compensation would squarely fall under section 51 of the Madras Court-fees and Suits Valuation Act of 1955 and the Court-fee payable is *ad valorem* Court-fee under Article 1 of Schedule I which prescribes not only fee for plaints, written statement pleading a set off or counter-claim but also for a memorandum of appeal presented to any Court. [*Para.* 10.]

Cases referred to :—

Gangadhar v. *N. A. M. Society*, A.I.R. 1971 Madh. Pra. 16 ; *Appavoo Mudaliar* v. *Special Deputy Collector, Madras*, (1964) 2 M.L.J. 487 ; *Hirji Virji* v. *Government o Bombay*, A.I.R. 1945 Bom. 348 ; *Crown* v. *Chandra Bhanlal*, A.I.R. 1957 Nag. 8 ; *Kanwar Jagat* v. *The Punjab State*, A.I.R. 1957 Punj. 32 ; *Mangal Sen* v. *Union of India*, A.I.R. 1970 Delhi 4; *Satya Charan* v. *State of West Bengal*, A.I.R. 1959 Cal. 609: *Ananda Lal Chakrabutty*, In re, A.I.R. 1932 Cal. 346 ; *Lakshminarayana* v. *Revenue Divisional Officer*, (1968) 1 An.W.R. 298 : A.I.R. 1968 Andh. Pra. 348; *Debi Din* v. *Secretary of State*, A.I.R. 1939 All. 127 ; *Rangoon Butaun and Co., Ltd.* v. *The Collector Rangoon*, (1912) 39 I.A. 197 : 23 M.L.J. 276 : I.L.R. 40 Cal. 21 : 16 I.C. 188 ; *Sanback Charity Trustee* v. *North Staffordshire Railway Co.*, (1877) L.R. 3 Q.B.D. 1 ; *J. Pattammal* v. *Collector of Madras*, (1972) 1 M.L.J. 52: 84 L.W. 803 : A.I.R. 1972 Mad. 158 : In re: *Bandapudi Venkatarathnam*, I.L.R. (1941) Mad. 935: (1941) 1 M.L.J. 721: A.I.R. 1941 Mad. 639.

Appeal against the decree of the District Court (Arbitrator) Coimbatore, dated 31st March, 1970 and made in A.C. No. 1 of 1965.

S. Palaniswami, for Appellant.

Additional Government Pleader, for Respondent.

* A.A. O.S.R. No. 62267 of 1970. *29th April*, 1974.

The Court made the following

ORDER.—The question that arises is whether in this appeal under section 11 of the Madras Requisitioning and Acquisition of Immoveable Property Act, 1956 (hereinafter referred to as the Requisitioning Act), *ad valorem* Court-fee is payable on the difference between the amount awarded and the amount claimed by the appellant as per section 51 of the Madras Court fees and Suits Valuation Act, 1955 (hereinafter referred to as the Madras Act), or, whether only fixed Court-fee under Article 3 of Schedule II of the said Act is payable. Agricultural lands belonging to the appellant, whose appeal is yet to be numbered, have been acquired under the Requisitioning Act. Under section 8 (1) (*b*) of the Requisitioning Act, the District Judge, Coimbatore, came to be appointed Arbitrator to determine the compensation payable in respect of the said lands. The Arbitrator has fixed the total compensation at Rs. 1,14,324-45 but the appellant claimed a total compensation of Rs. 5,82,222-00. The value of the Civil Miscellaneous Appeal shown in the memorandum of appeal is the difference between the abovesaid two sums, and that is, Rs. 4,67,897-55. But only a fixed Court-fee of Rs. 10 has been paid. No provision is quoted in the memorandum of appeal. However, it is claimed that such fixed Court-fee has been paid as per Article 3 of Schedule II of the Madras Act. The question is whether section 51 of the Madras Act which contemplates payment of *ad valorem* Court-fee on the difference between the amount awarded and the amount claimed by the appellant, is applicable, or whether Article 3 of Schedule II is applicable. If section 51 is applicable, then *ad valorem* Court-fee on the difference claimed, namely Rs. 4 lakhs odd, has to be paid in accordance with Schedule I. The contention of the learned Counsel for the appellant is that section 51 of the Madras Act is not applicable and that, therefore, only fixed Court-fee under Article 3 of the Schedule II is payable.

2. Section 51 of the Madras Act is in the same terms as section 8 of the Central Court fees Act, 1870 (hereinafter referred to as the Central Act). A plain reading of section 51 of the Madras Act would undoubtedly take in the present appeal. Section 51 says that the fee for the memorandum of appeal, against an order relating to compensation under any Act for the acquisition of property for public purposes, shall be computed on the difference between the amount awarded and the amount claimed by the appellant. In the present case, the Arbitrator appointed under the Requisitioning Act has given an award under section 8 of that Act and under section 9 of the said Act, there is a statutory obligation on the part of the authority authorised by the State Government to pay the said amount awarded, to the appellant herein. There can be no doubt that the award of the Arbitrator in this case is "an order relating to compensation under any Act" as contemplated under section 51 of the Madras Act.

3. The learned Counsel for the appellant, however, contended that what the Arbitrator made being only an award, it is in the nature of an opinion and not an order. The learned Counsel contended that in the award there is no command or direction to the authority authorised by the State Government to pay the compensation determined, and that therefore the award cannot be construed as an order as contemplated under section 51 of the Madras Act. This is not tenable. "Order" does not necessarily mean that it should contain either a direction or a command. In Ramanatha Aiyar's Law Lexicon (1940 Edition) at page 918, the word "order" is no doubt defined as a mandate or command, but it is also stated that the word "order" would mean judgment or conclusion. A Division Bench of the Madhya Pradesh High Court in *Gangadhar v. N. A. M. Society*[1], has held that the word "order" means a decision or a finding. Even in the Code of Civil Procedure, the word "order" is defined only as a formal expression of any decision of a civil Court (which is not a decree). Of course as per that definition which is contained in section 2 (14) of the Code of Civil Procedure, the formal expression of any decision must be by a civil Court. The point to be noted now is that even as per that definition, an order need not contain either a direction or a command but it need be a formal expression of any

1. A.I.R. 1971 M.P. 16.

decision. In the present case it is wholly untenable to contend that the award passed by the Arbitrator is only an expression of opinion. Undoubtedly it is a formal expression of a decision regarding the compensation payable to the appellant. Apart from this, as already seen, section 9 of the Requisitioning Act makes it obligatory, on the part of the authority authorised by the State Government, to pay the compensation so determined by the Arbitrator. If sections 8 and 9 of the Requisitioning Act are read together, one can even spell out a command or a direction to the authority concerned to pay the compensation determined by the Arbitrator. Even otherwise, as I said, it is not necessary that there should be either a direction or a command, to make an award an "order" as contemplated under section 51 of the Madras Act. Further the last part of the section speaks of the 'difference between the amount awarded under the order' and the amount claimed, for computing the Court-fee payable. That also shows that the word 'order' takes in an award.

4. The learned Counsel for the appellant referred to the decision of Srinivasan, J., reported in *Appavoo Mudaliar* v. *Special Deputy Collector, Madras*[1] and contended that by virtue of that decision it must be held that only fixed Court-fee is payable in the present case. That is again untenable. The case before Srinivasan, J., was under the Madras Slum Improvement Act. The question was whether in an appeal under section 6 (4) (*a*) of the said Act, *ad valorem* Court-fee as contemplated under section 51 or only fixed Court-fee under Article 3 of Schedule II of the Madras Act is payable. The learned Judge pointed out that the appeal under section 6 (4) (*a*) of the said Act is not against any award, the stage of passing of an award having not yet been reached, and that therefore the latter part of section 51 of the Madras Act which speaks about the difference between the "amount awarded" and the "amount claimed", does not arise. This decision would in no way help the appellant in the present case. While in the case before Srinivasan, J., the stage of passing of an award had not been reached by the time the appeal under section 6 (4) (*a*) of the Madras Slum Improvement Act was filed, that is not the position in the present case. Undoubtedly, an award has been passed and the appeal relates to the difference between the amount awarded and the amount claimed. As a matter of fact, the judgment of Srinivasan, J., proceeds on the basis that if an award has been passed and the appeal is for enhancement of the compensation, namely, for the difference between the amount awarded and the amount claimed, section 51 of the Madras Act would be attracted. To that extent this decision is against the contention of the learned Counsel for the appellant.

5. Then the learned Counsel, relying upon the decision of the Bombay High Court reported in *Hirji Virji* v. *Government of Bombay*[1], contends that the 'order' referred to in section 51 of the Madras Act should be one as defined under section 2 (14) of the Code of Civil Procedure and the award in question being one not in conformity with the definition contained in section 2 (14) of the Code of Civil Procedure, section 51 of the Madras Act is not applicable. As already seen, section 2 (14) of the Code of Civil Procedure defines the word "order" as a formal expression of any decision of a civil Court which is not a decree. I have already pointed out that the award in this case is undoubtedly a formal expression of a decision which is not a decree. But it is not by a civil Court. The District Judge, Coimbatore who was appointed Arbitrator under section 8 of the Requisitioning Act was not functioning as a civil Court while he passed the award. Even though the award passed in this case is a formal expression of a decision which is not a decree, as contemplated under section 2 (14) of the Code of Civil Procedure, it does not come within the definition of the word "order" contained in that section, merely because it is not a decision by a civil Court. Therefore if the contention of the learned Counsel that the word "order" contained in section 51 of the Madras Act must be construed to be one as defined under section 2 (14) of the Code of Civil Procedure, it means that section 51 of the Madras Act is applicable only to appeals against decisions of a

1. (1964) 2 M.L.J. 487.

1. A.I.R. 1945 Bom. 348.

civil Court. Needless to say that the Madras Act as well as the Central Act are not confined to Court-fees payable on decisions arising out of disputes on civil Courts. It is true that the word " order " is not defined in the Madras Act (as well as the Central Act) but that does not mean that one should look to the definition contained in the Code of Civil Procedure, especially when the section does not use the word " order " simpliciter, but used the expression " order relating to compensation under any Act."

6. The argument that the word " order " occurring in section 51 of the Madras Act should be understood as per the definition contained in section 2 (14), Code of Civil Procedure, or in other words, that section 51 applies only to appeals against decisions of a civil Court and that in the present case, the decision not being of a civil Court, only fixed Court-fee is payable can be shown to be untenable by a mere reading of section 8 of the Central Act and Article 11 of Schedule II of the said Act as amended in Madras. The Madras Act is of the year, 1955. Prior to the passing of the Madras Act, the Central Act was applicable to this State. Section 8 of the Central Act is in the same terms as section 51 of the Madras Act. Article 11 of Schedule II of the Central Act corresponds to Article 3 of Schedule II of the Madras Act. That Article (Article 11 of Schedule II), without the amendment effected by this State, relates to memorandum of appeal when the appeal is not from a decree or order having the force of a decree. But Article 11 of Schedule II as made applicable to this State reads thus :

> " Memorandum of appeal when the appeal is from an order inclusive of an order determining any question under section 47 or section 144 of the Code of Civil Procedure, 1908, and is presented .... "

If the word " order " occurring in section 8 of the Central Act is to be understood as defined under section 2 (14) of the Code of Civil Procedure, or in other words, " order " under section 8 of the Central Act should be a decision by a civil Court, there is no reason why the word " order " occurring in Article 11 of Schedule II as amended in this State, should not also be understood only as a decision of a civil Court. In fact, that Article specifically includes an order determining any question under section 47 or section 144 of the Code of Civil Procedure, which means, that Article covers a decision by the civil Court. To put it in other words, the word " order " occurring in that Article would be well within the definition of the said word contained in section 2 (14) of the Code of Civil Procedure. Then the position would be section 8 as well as Article 11 of Schedule II as amended by the Madras State would only relate to decisions by civil Courts. There is no scope for excluding only section 8 and applying Article 11 of Schedule II in respect of appeals against decisions not by a civil Court. Therefore, I am clearly of the view that the word "order" occurring in section 8 of the Central Act (as well as in section 51 of the Madras Act) is not to be understood as defined under section 2 (14) of the Code of Civil Procedure.

7. In *Hirji Virji* v. *Government of Bombay*[1], referred above, Wadia, J., held that only fixed Court-fee is payable on the appeal against the award of the Arbitrator under section 19 of the Defence of India Act on two grounds namely, (1) that the award is not a decree or an order having the force of a decree and that therefore Article 11 of Schedule II of the Central Act would apply: and (2) that it is not an order as contemplated under section 8 of the Central Act. The learned Judge's view is that the word " order " occurring in section 8 should be understood as defined in section 2 (14) of the Code of Civil Procedure.

8. For reasons discussed supra, with respect, I am unable to agree with the view of Wadia, J., of the Bombay High Court regarding the second ground, namely, the one relating to the interpretation of the word " order " occurring in section 8 of the Central Act (section 51 of the Madras Act). No doubt the Nagpur High Court in *Crown* v. *Chandra Bhanlal*[2], in respect of an award under section 19 of the Defence of India Act, a Division Bench of the

1. A.I.R. 1945 Bom. 348.
2. A.I.R. 1957 Nag. 8.

Punjab High Court in *Kanwar Jagat* v. *The Punjab State*[1], in respect of an award under the Punjab Requisitioning and Acquisition Act, 1953, as well as a Division Bench of the Delhi High Court in *Manglal Sen* v. *Union of India*[2], in respect of an award under the Re-settlement of Displaced Persons (Land Acquisition) Act, 1948, have taken a similar view as the Bombay High Court. But in *Satya Charan* v. *State of West Bengal*[3], the decision of the Bombay High Court in *Hirji Virji* v. *Government of Bombay*[4], has been dissented from. That decision is in respect of an award under the Requisitioning and Acquisition of Immovable Property Act, 1952 and the learned Judge of the Calcutta High Court, after extensively quoting the observations of Wadia, J., of the Bombay High Court observed in paragraph 22 at page 613 as follows :

> " With very great respect, I dissent from the Judgment of Wadia, J., section 8 of the Court-fees Act does not use the expression " order " simpliciter but uses the expression " order relating to compensation under any Act for the time being in force." (underlining herein by myself). That being so, there is no reason why the expression " order " in section 8 of the Court-fees Act must be treated as an order under section 2 (14), Civil Procedure Code."

The same Court (The Calcutta High Court) in an early case reported in *Ananda Lal Chakrabutty*, In re[5], has held that in an appeal from an award from the Calcutta Improvement Tribunal, the Court-fee payable on the memorandum of appeal is governed by section 8 of the Court-fees Act (Central Act) and *ad valorem* Court-fee under Article 1 of Schedule I is payable.

9. A Division Bench of the Andhra Pradesh High Court in *Lakshminarayana* v. *Revenue Divisional Officer*[6], which is a case under the Requisitioning and Acquisition of Immovable Property Act, has taken a similar view. They have dissented from the judgment of the Bombay High Court, the Division Bench of the Punjab High Court and also that of the Allahabad High Court reported in *Debi Din* v. *Secretary of State*[1], and held that the award passed under the Requisitioning and Acquisition of Immovable Property Act, 1952, is an order coming within the meaning of section 8 of the Court fees Act (Central Act) and that the appellant would have to pay *ad valorem* Court-fee under Article 1 Schedule I of the Court-fees Act. With respect, I agree with the view of the Andhra Pradesh High Court and that of the Calutta High Court.

10. In the present case, I am not concerned with the correctness or otherwise of the first ground relied on by Wadia, J., in *Hirji Virji* v. *Government of Bombay*[2]. There the learned Judge said that the award (in that case by the Arbitrator under section 19 of the Defence of India Act) is not a decree or an order having the force of a decree and that therefore Article 11 of Schedule II of the Central Act would apply. As already noticed the said Article with the Madras Amendment is in different terms. That Article with the Madras Amendment applied to a memorandum of appeal when the appeal is from an order inclusive of an order determining any question under section 47 or section 144 of the Code of Civil Procedure, 1908. It does not apply to a " a memorandum of appeal when the appeal is not from a decree or an order having the force of a decree ". The corresponding provision in the Madras Act (Article 3 of Schedule II) also does not refer to a " memorandum of appeal when the appeal is not from a decree or an order having the force of a decree ". On the other hand, the said Article in the Madras Act relates to a " memorandum of appeal from an order inclusive of an order determining any question under section 47 or section 144 of the Code of Civil Procedure, 1908, and not otherwise provided for ". Therefore, the question whether the award in this case is a decree or an order having the force of a decree does not arise. Under Article 3 of Schedule II of the Madras Act, the provision is only in respect of an appeal from an " order .... not otherwise provided for ". As section 51 of the Madras

1. A.I.R. 1957 Punj. 32.
2. A.I.R. 1970 Delhi 4.
3. A.I.R. 1959 Cal. 609.
4. A.I.R. 1945 Bom. 348.
5. A.I.R. 1932 Cal. 346.
6. (1968) 1 An.W.R. 298: A.I.R. 1968 A.P. 348.

1. A.I.R. 1939 All. 127.
2. A.I.R. 1945 Bom. 348.

Act corresponding to section 8 of the Central Act does not provide for an appeal from "an order" would have no application. The simple question is whether the award in this case is an "order relating to compensation ... for the acquisition of property as contemplated under section 51 or it is an "order ... not otherwise provided for" as contemplated under Article 3 of Schedule II of the Madras Act. I am unable to understand as to why the award should be understood as an "order ... not otherwise provided for" in the face of section 51. The appeal in this case would squarely fall under section 51 of the Madras Act and the Court-fee payable is under Article 1 of Schedule I which prescribes not only the fee for plaints, written statement, pleading, a set-off or counter claim but also for a memorandum of appeal presented to any Court.

11. Regarding the question of payment of Court-fee, there is no distinction between an appeal relating to an award under the Land Acquisition Act and an appeal in respect of an award relating to compensation under any other Act. Admittedly *ad valorem* Court-fee is payable on an appeal presented by the claimant in respect of the difference between the amount awarded and the amount claimed by him, if the award is under the Land Acquisition Act. Such payment of *ad valorem* Court-fee is because of the provision contained in section 8 of the Central Act and the corresponding provision in the Madras Act, namely section 51 therein and not because the award under the Land Acquisition Act is deemed to be a decree as provided under section 26 (2) of the Land Acquisition Act. It must be remembered that sub-section (2) of section 26 of the Land Acquisition Act had been inserted only by the Amending Act (XIX of 1921). This provision so introduced by the Amending Act says that every award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of section 2, clause (2) and section 2, clause (9) respectively of the Code of Civil Procedure, 1908. The abovesaid sub-section (sub-section (2) of section 26) had been introduced by the 1921 amendment not for the purpose of levying *ad valorem* Court-fee on a memorandum of appeal against the disallowed portion of the claim. The introduction of the abovesaid sub-section was consequential to the amendment of section 54, by the same Amending Act, namely Act XIX of 1921. Section 54 as it originally stood read thus:

> "Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or any part of the award in any proceeding under this Act."

Under that provision, an appeal against the award lay to the High Court, but there could be no second appeal and there was also no right of appeal to the Privy Council. The Privy Council held in *Rangoon Butaun and Company Limited* v. *The Collector of Rangoon*[1]:

> "As Lord Bramwell observed in the case of *Sanback Charity Trustee* v. *North Staffordshire Railway Company*[2], an appeal does not exist in the nature of things. A right of appeal from any Tribunal must be given by express enactment. A special and limited appeal is given by the Land Acquisition Act from the award of the Court to the High Court. No further right of appeal is given. Nor can any such right be implied ... Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of the ordinary suit or including the right to carry an award made in an arbitration as to the value of the land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction."

Further, as sections 26 and 54 stood originally, the award was not capable of being executed. In order to remove the anomaly the award under the Land Acquisition Act was placed on a par with a decree as defined under section 2 (2) of the Code of Civil Procedure. Therefore the fact that an award under the Land Acquisition Act is deemed to be a decree within the meaning of section 2 (2) has

1. (1912) 39 I.A. 197 : 23 M.L.J. 276 : I.L.R. 40 Cal. 21 : 16 I.C. 188.
2. (1877) L.R. 3 Q.B.D. 1.

nothing to do with the question of proper Court-fee on a memorandum of appeal in respect of the difference between the amount claimed and the amount awarded. *Ad valorem* Court-fee is paid on a memorandum of appeal filed by a claimant under the Land Acquisition Act only under section 8 of the Central Act or under section 51 of the Madras Act, as the case may be, read with Article 1 of Schedule I.

12. A Full Bench of this Court in *J. Pattammal* v. *Collector of Madras*[1] has proceeded on the footing that *ad valorem* Court-fee is payable on a memorandum of appeal in respect of the difference between the amount claimed and the amount awarded under the Land Acquisition Act, under section 51 of the Madras Act. Of course, the present question did not directly arise in that case. There, the only point was whether Court-fee is payable on interest on the difference between the amount claimed and the amount awarded. But as I said, the Full Bench has proceeded on the footing that in respect of the difference *ad valorem* Court-fee payable is under section 51 of the Madras Act (and not because the award is deemed to be a decree as stated in section 26 (2) of the Land Acquisition Act).

13. Lastly the learned Counsel for the appellants referred to In re, *Bandapudi Venkataratnam*[2] in support of his contention. That was a case of an appeal filed under Rule 9 of the Rules framed under the Madras Agriculturists' Relief Act (IV of 1938). The said Rule stated that the order of the Court declaring the amount of the debt under Rule 7 thereof, shall be 'subject to appeal and second appeal as if it were a decree in an original suit'. Because of this provision, which has stated that the order is subject to an appeal and second appeal as if it were a decree, *ad valorem* Court-fee was claimed on the appeal memo presented under that Rule. A Division Bench of this Court negatived the contention of the Revenue with the following observations occurring in column 2 of page 640 :

> " It is contended that if this order is to be treated for purposes of appeal as if it were a decree, it must necessarily attract the provisions of the Court-fees Act for appeals from decrees. We are unable to accept this contentions in the absence of any specific provision in the Rules attracting the provisions of the Court-fees Act governing appeals from decrees. The Court-fees Act being a fiscal statute, we cannot in the presence of ambiguity guess at the meaning of the authority which enacts the Rules and draw from the presumed intentions of that authority an inference which is adverse to the party who has to pay the tax."

The Division Bench further pointed out that Rule 11 of Schedule II as amended in Madras relates to a memorandum of appeal when the appeal is from an order inclusive of an order determining any question under section 47 or section 144, Civil Procedure Code, and that there is nothing in the said Article which would exclude the applicability of the same to the case before them namely an appeal under Rule 9 of the Rules framed under the Madras Agriculturists Relief Act. I am unable to see how this decision has any bearing on the present case. *Ad valorem* Court-fee is claimed on the memorandum of appeal in the present case not because the award is a decree or deemed to be a decree or should be treated as if it were a decree but because it is an order relating to compensation. The question is whether section 51 of the Madras Act corresponding to section 8 of the Central Act is applicable or not. I have already sufficiently indicated that the section does apply as the award by the Arbitrator is an " order relating to compensation ". Obviously that section has nothing to do with the appeal under Rule 9 of the Rules framed under the Madras Agriculturists Relief Act which was before the Division Bench in In re, *Bandapudi Venkataratnam*[1]. Therefore that decision has no bearing at all to the present case.

14. The appellant has to pay *ad valorem* Court-fee on the appeal memorandum

1. (1972) 1 M.L.J. 52 : 84 L.W. 803 : A.I.R. 1972 Mad. 158.
2. I.L.R. (1941) Mad. 935 : (1941) 1 M.L.J. 721 : A.I.R. 1941 Mad. 639.

1. (1941) 1 M.L.J. 721 : A.I.R. 1941 Mad. 639.

according to the value of the appeal shown therein. Return the appeal memo giving 4 months time to pay Court-fee.

S.J. *Appeal memo. returned with directions to pay proper Court-fee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

Ramachandra Chettiar .. *Petitioner**

v.

G. M. Ramaswami Chettiar and another .. *Respondents.*

Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), *sections* 12, 18—*Land sold in auction—Vendor filing return under the Act—Authorised Officer preparing statement—One of the items sold shown as surplus—Purchaser filing objections—Officer overruling objections—Appeal by purchaser dismissed—Revision—Pending revision final statement under section* 12 *published—Notification under section* 18 *published—Validity of final statement and notification.*

The first respondent had a half share in nine survey numbers, amongst other lands. The said half share was sold in Court auction and the revision petitioner purchased the same on 5th January, 1967. The first respondent had filed a return under the Act LVIII of 1961 and the Authorised Officer prepared a draft statement under section 10 (1) of the Act, dated 18th October, 1967, showing one of the nine items as surplus. Notice under section 10 (5) was served on the revision petitioner as a person interested in the land. The Authorised officer overruled his objections by his order dated 16th March, 1968. Against this the revision petitioner filed an appeal which was dismissed on 18th August, 1972. The present revision petition was filed on 22nd September, 1972. During its pendency final statement under section 12 of the Act came to be published on 13th December, 1972 as no stay was granted in the revision petition. On 7th March, 1973, notification under section 18, vesting in the Government the lands declared to be surplus came to be published. Possession of lands was stated to have been taken on 23rd April, 1973. A copy of the final statement had not been served on the revision petitioner. Further under rule 20 of the Madras Land Reforms (Fixation of Ceiling on Land) Rules, 1962, the notification under section 18 (1) shall be in form No. 12 and besides publication in the *Fort Saint George Gazette* it has to be published in the District Gazette of the District in which the land specified in the notification is situated. In the instant case a notification under the District Gazette had not been published.

On the question of the validity of the final statement and notification,

Held, The publication of the final statement under section 12 and the notification under section 18 could be only subject to the result of the revision petition which had been pending. [*Para.* 6.]

As no copy of the final statement under section 12 or under section 14 had been served on the revision petitioner which was a clear violation of the provision contained in section 12 itself, there had been no proper publication of the final statement. The publication of notification under section 18 would be proper only if there had been proper publication of the final statement under section 12. [*Para.* 7.]

Again the notification under section 18 (since it had not been published in the District Gazette of the district concerned) had also not been properly published. Under such circumstances, it could not be contended, in any event, that due to subsequent events, namely the notification under section 18 vesting the land in Government, the revision petitioner had to go without remedy. [*Para.* 7.]

The order of the Authorised Officer on the objection of the revision petitioner

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* C.R.P. No. 951 of 1973. *15th April,* 1974.

as confirmed by the appellate authority was liable to be set aside.

[*Para.* 8.]

Case referred to :—

Kaliyaperumal Nattar v. *Authorised Officer*, (1973) 2 M.L.J. 96: 86 L.W. 446: A.I.R. 1973 Mad. 389.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge of Cuddalore, dated 10th August, 1972 and made in C. M. A. No. 66 of 1969. (MRI 44-R Authorised Officer, Land Reforms, Cuddalore 1), dated 16th March, 1968.

K. N. Balasubramanian, for Petitioner.

P. S. Ramachandran, *G. R. Lakshmanan* and the Additional Government Pleader, for Respondents.

The Court made the following

ORDER :—This is a revision petition against the order of the Authorised Officer, Land Reforms, Cuddalore, overruling the objections raised under section 10 (5) of the Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), (hereinafter referred to as the Act) the said order having been confirmed by the appellate Judge (Subordinate Judge, Cuddalore). The lands in question belonged to one G. M. Ramaswami Chettiar. He had, amongst other lands a half share in nine survey numbers. The said half share in all the nine items came to be sold in Court-auction and the revision petitioner herein purchased the same on 5th January, 1967. The total extent so purchased is 5.38 acres. He obtained the sale certificate on 18th March, 1967.

2. The said Ramaswami Chettiar who has been impleaded as the first respondent in this revision petition had filed a return under the provisions of the Act and the Authorised Officer prepared the draft statement under section 10 (1) of the Act which is dated 18th October, 1967. In the said draft statement only one of the nine items was shown as surplus. Notice under section 10 (5) of the Act came to be served on the revision-petitioner as a person interested in the land. The revision-petitioner filed his objections on 10th January, 1968. The Authorised Officer however, overruled his objections by his order, dated 16th March, 1968. Against that the revision-petitioner filed Civil Miscellaneous Appeal No. 66 of 1968 on the file of the Subordinate Judge, Cuddalore but the said appeal came to be dismissed on 10th August, 1972. Hence this revision petition and the same had been presented in this Court on 22nd September, 1972.

3. Subsequently, that is during the pendency of this revision petition, final statement under section 12 of the Act came to be published on 13th December, 1972, as no stay had been granted in the revision petition. On 7th March, 1973 notification under section 18, vesting in the Government the lands declared to be surplus in the holding of Ramaswami Chettiar, came to be published. It is stated on behalf of the Authorised Officer who has been impleaded as the second respondent herein, that possession of surplus lands so notified has been taken on 23rd April, 1973.

4. The question is whether the taking over of lands which the revision-petitioner purchased in the Court auction as surplus of the holding of Ramaswami Chettiar is valid. Under section 23 of the Act, the provision is that in fixing, for the first time after the date of the commencement of the Act, the ceiling area of any person holding land in excess of 30 standard acres (since amended as 15 standard acres), the Authorised Officer shall not take into consideration any transfer including a sale in execution of a decree. Admittedly, the Court auction sale under which the revision-petitioner purchased the lands, being on 5th January, 1967, is after the notified date mentioned in section 23. The Authorised Officer and the learned Appellate Judge have overruled the objections of the revision-petitioner on the ground that under section 23 of the Act the Authorised Officer was to ignore the sale. But it has been held by a Division Bench of this Court in *Kaliyaperumal Nattar* v. *Authorised Offiicer*[1], that as section 23 does not say that the transfer (made after the notified date) is rendered

1. (1973) 2 M.L.J. 95: 86 L.W. 446: A.I.R. 1973 Mad. 389.

void and the section does not deal with the transferee's right, there is nothing in the Act to affect the rights of the transferee. In that case there was the draft statement under section 10 followed by the final statement under section 12. Thereafter, there was a notification under section 18 (1) and proclamation under section 18 (2), in respect of the surplus lands which according to the provisions of the Act vested in the Government. The Division Bench has pointed out that as section 23 does not say that the transfer by itself is bad for any reason and as the transfer is not rendered void either expressly or by any statement in the section and the section does not deal with the transferee's rights, the Authorised Officer had no right to take the land in the possession of the transferee. The above decision squarely applies to the facts of the present case.

5. However, it is contended on behalf of the Authorised Officer that while in the above reported decision the notification under section 18 was sought to be quashed in writ proceedings, the present case is not for any such relief and that therefore in view of the subsequent events namely publication of the final statement under section 12 and then the notification under section 18 vesting the land in the Government, the revision-petitioner is without any remedy. This is not tenable. It may be noted that in the reported case, in spite of the fact that the notification under section 18 had been published according to which the land vested in the Government, the Division Bench has observed in paragraph 4 of the judgment that the land had not vested in the Government as provided under section 18 (3). This is on the basis that there is nothing in the Act to affect the transferee's right. It has already been noted that though section 23 says that the transfer made after the notified date is to be ignored by the Authorised Officer while preparing for the first time the draft statement, the section does not say anything about the rights of the transferee. It is in that context the Division Bench has observed that in spite of there having been a notification under section 18, the land had not vested in the Government.

6. Whatever that be, in the present case, the notification under section 18 is very much subsequent to the filing of the revision petition in which the order of the Authorised Officer under section 10 (5) is challenged. It is not right to contend that because of the subsequent events, namely the publication of the final statement under section 12 and the notification under section 18, the civil revision petition has become infructous. On the contrary, the publication of the final statement under section 12 and the notification under section 18 can be only subject to the result of the revision petition which has been pending. Under such cirucmstances, the fact that in the present case no *certiorari* is prayed for does not mean that the revision-petitioner cannot get relief.

7. Further the notification under section 18 itself does not appear to be in accordance with law. Section 12 makes it obligatory that a copy of the final statement should be served on the persons referred to in sub-section (5) of section 10. Admittedly, the revision-petitioner is one such person. It is not disputed that a copy of the final statement under section 12 had not been served on the revision-petitioner. Section 18 contemplates publication of notification in respect of surplus lands only after due publication of the final statement under section 12 (or under section 14). As no copy of the final statement under section 12 had been served on the revision-petitioner which is a clear violation of the provision contained in section 12 itself, it cannot be held that there had been proper publication of the final statement. The publication of notification under section 18 would be proper only if there had been proper publication of the final statement under section 12. This is one of the defects in the publication of the notification under section 18. But that is not all. Under rule 20 of the Madras Land Reforms (Fixation of Ceiling on Land) Rules, 1962, the notification to be published under section 18 (1) shall be in form No. 12 and it shall be besides being published in the *Fort St. George Gazette*, be published in the District Gazette of the district in which the land specified in the notification or any part thereof is situated. Though in the present case a notification under section 18 had been published in the *Fort St. George Gazette*, dated 7th March, 1973, it is not

disputed that such notification had not been published in the District Gazette of the district concerned. Therefore, the notification under section 18 has also not been properly published. Under such circumstances, it cannot be contended in any event, that due to subsequent events, namely the notification under section 18 vesting the land in the Government, the revision-petitioner has to go without remedy.

8. The revision petition is allowed and the order of the Authorised Officer on the objection of the revision-petitioner as confirmed by the appellate authority is set aside. The matter is remitted back to the authorised officer for further proceedings, in the light of the observations above. I make no order as to costs.

S.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—*K. Veeraswami, C. J.* and *A. Varadarajan, J.*

Sri Vanamamalai Mutt, Nanguneri represented by its head His Holiness the Jeer .. *Appellant**

v.

The Panchayat Rajakkalamangalam, represented by its President, Rajakhalamangalam, Tirunelveli and others .. *Respondents.*

Tamil Nadu Panchayat Act (XXXV of 1958), section 119 (3)—Rate of tax—Fixation—Delegated to Panchayat—Constitutional validity.

Section 119 (3) of the Tamil Nadu Panchayat Act does not suffer from the vice of excessive delegation because it has left the fixation of the rates of tax leviable under the Act to the Panchayat. Section 119 (3) is not unconstitutional. Under the District Municipalities Act and also the City Corporation Act, though the Legislature had authorised the levy of property tax, the rate of tax had been left to the Municipal Council itself. It is no doubt, open to the Legislature to impose an upper limit for rates. But that was not a condition precedent for the validity of the power of the Municipal Council or Panchayat to fix the rate. The rate of tax fixed in the instant cases was also not excessive and it appeared to be reasonable. [*Para.* 3.]

Case referred to :—

Municipal Corporation of Delhi v. *B C. S. & W. Mill*, (1969) 1 S.C.J. 621 : (1968) 3 S.C.R. 251 : A.I.R. 1968 S.C. 1232.

Appeals under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ismail, dated 7th November, 1969 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 3410 and 3411 of 1967 presented under Article 226 of the Constitution of India to issue writs of *mandamus* forbearing the first respondent in both the petitions from collecting or from taking any steps to collect the tax called "Vivasaya Abiviruthivari" Agricultural Development Tax and Gramia Abiviruthi ari (Village Development Tax) respectively.

M. Srinivasan and *R. Gopalaswami Iyengar*, for Appellant.

Raju for *Alagiriswami*, and Government Pleader, for Respondents.

The Order of the Court was delivered by

Veeraswami, C. J.—On the ground of excessive delegation, section 119 (3) of the Tamil Nadu Panchayat Act is attacked. There are two taxes designated as Agricultural Development Tax and Village Development Tax, with which we are concerned. Both the taxes have been raised for the specific purpose of laying roads in the village. Section 119 authorises a village Panchayat to levy such taxes. Sub-section (3) says that, subject to such restrictions and conditions, if any, as the case may be, the Panchayat may levy a tax on agricultural land for a specific purpose. This power is, of course, subject to rules to be made and with the sanction of the Inspector. While granting such sanction, the Inspector may also prescribe restrictions and conditions. By reason

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*W.A. Nos. 484 and 553 of 1970. 18th December, 1973.

of the rule-making power, rules have been made by G.O. Ms. No. 184, L.A. dated 1st January, 1962. Rule 1 (*b*) mentions the specific purposes for which the taxes can be levied. One of them is the construction of a road or bridge or culvert in the village.

2. The two points urged for the appellant are: (1) that the fixation of rates has been left to the Panchayat whieh amounted to excessive delegation; and (2) that the tax is not related to agricultural purposes. As to the second point, there is no argument addressed to us that the tax is in the nature of fee and, that being so, the contention has no merit. The tax raised may be devoted to any purpose of a public character.

3. As to the first contention, under the District Municipalities Act and also the City Corporation Act, though the Legislature has authorised the levy of property tax, the rate of tax has been left to the Municipal Council. No doubt, the Legislature may choose to impose an upper limit for rates. But that is not, in our opinion, a condition precedent for the validity of the power of the Municipal Council or Panchayat to fix the rate. The rate of tax fixed in these cases is also not excessive and it appears to be reasonable.

4. The appeals are dismissed with costs. Counsel's fee Rs. 100 in each case.

S.J. ——— *Appeal dismissed.*

[NOTE:—The judgment under appeal was that of Ismail, J. which was as follows :

(W.P. 3410. and 3411 of 1967, dated 17th November, 1969.)

The only point raised in these writ petitions is as regards the validity of sub-section (3) of section 119 of the Madras Panchayat Act (XXXV of 1958) hereinafter "referred to as the Act". The sub-section is as follows :

> " (3) Subject to such rules as may be prescribed and with the sanction of the Inspector and subject to such restrictions and conditions, if any, as may be imposed by him either at the time of granting sanction or later, the Panchayat may also levy in the village or town as the case may be a tax on agricultural land for a specific purpose."

The only ground of challenge to the validity of this sub-section is that in regard to the matter of taxation the essential legislative function is to fix the rate of tax or to prescribe the maximum subject to which alone the tax can be levied and that this essentil legislative function has been delegated to the Panchayat and to other authorities by the Legislature and therefore the sub-section is unconstitutional.

6. Since the sub-section itself refers to the rules as may be prescribed, it is necessary to refer to the rules for the purpose of testing the validity of this argument. By G.O. Ms. No. 184, Local Administration, dated 22nd January, 1962 the Government have framed rules in exercise of the powers conferred by sub-section (3) of section 119 and cluse (*xx*) of sub-section (2) of section 178 of the Act. The rules are elaborate in nature and it is desirable to extract the entire rules in this behalf :

> " The tax on agricultural land in any village shall be leviable every half-year for a specific purpose, such as—
>
> (1) (*a*) repairs to irrigation channels and tanks in respect of which no kudimaramat fee is levied under sub-section (2) of section 85 of the Madras Panchayat Act (XXXV of 1958).
>
> (*b*) construction, maintenance, repair, extension or improvement of waterworks or drainage work ;
>
> (*c*) lighting by gas or electricity ;
>
> (*d*) construction of a road, or a bridge or culvert ; or
>
> (*e*) construction of buildings intended to be used for Cultural , Educational or Medical and other allied purposes ; or
>
> (*f*) protection of trees, plants and crops ;
>
> (*g*) raising matching contribution for any Programme of development specified in the panchayat Department Schematic Budget or that may be

included in it from time to time and the levy of such tax shall take effect from the first day of the half-year following that in which it is sanctioned;

(*h*) Construction or maintenance of Panchayat soil conservation works : Provided that the tax for the purpose specified in clause (*b*) shall be leviable on such agricultural land as is benefited by the construction or maintenance of works referred to in that clause.

(2) The rate of tax shall be on the basis of the extent of the land, but the Panchayat may adopt different rates, for wet land, well irrigated land and dry land so as to be commensurate with the value of the land.

(*a*) Every proposal for the levy of the tax shall be submitted to the Revenue Divisional Officer through the Panchayat Extension Officer. The Revenue Divisional Officer shall forward it to the sanctioning authority.

(*b*) Every such proposal shall be accompanied by,

(i) a resolution of the Panchayat passed at a meeting specially convened for the purpose and supported by not less than one half of the sanctioned strength of the Panchayat specifying the purpose for which, the rate at which, and the period for which the tax is to be levied:

(ii) a statement showing the receipts and charges under the various heads of accounts for the three years preceding the year in which the proposal is made ;

(iii) the budget estimate for the year is which the proposal is made ;

(iv) the particulars of the approximate or estimated cost of the work in respect of which the tax is proposed to be levied and the amount of tax likely to be realised in a half-year.

(3) The rate at which and the period for which the tax shall be levied shall be specified in the order sanctioning the levy of the tax. The period specified in the order may be extended from time to time if necessary, in order that the purpose for which tax is levied may be fulfilled:

Provided that the panchayat may for sufficient reason, and with the approval of the sanctioning authority, alter the rate, suspend or cancel the levy of the tax within the period so specified in the order.

(4) The proceeds of the tax shall form a separate fund, earmarked for the purpose for which it is levied and a separate account shall be maintained for the transactions relating to the fund.

(5) The rules issued under Clause (*xx*) and (*xxii*) of sub-section (2) of section 178 of the Madras Panchayats Act, etc., regarding the assessment and collection of taxes shall apply *mutatis mutandis* to the assessment and collection of this tax."

It will be seen that the sub-section itself provides for the following safeguards : (1) levy of the tax must be subject to the rules as may be prescribed by the Government ; (2) the levy must be with the sanction of the Inspector and subject to such restrictions and conditions as may be imposed by him ; (3) the levy must be for a specific purpose. In addition to these three safeguards contained in the statute, itself, there are the following safeguards contained in the rules framed under the sub-section : Rule 1 extracted above refers to the purposes for which alone the tax can be levied. Rule 2 deals with the rate and quantum of tax. The safeguards provided by this rule are that the proposal for levy of tax shall be presented to the Revenue Divisional Officer through the Panchayat Extension Officer; (2) the proposal shall be accompanied by a resolution of the Panchayat passed at a meeting specially convened for the purpose and supported by not less than one half of the sanctioned strength of the Panchayat ; (3) the resolution must specify the purpose for which, the rate at which and period for which the tax is to be levied ; (4) the proposal must be accompanied by a statement showing the receipts and charges under the various heads of accounts for the three years preceding the year in which the proposal is made ; (5) the proposal

must also be accompanied by the budget estimate for the year in which the proposal is made ; (6) it must further be accompanied by the particulars of the approximate or estimated cost of the work in respect of which the tax is proposed to be levied and the amount of tax likely to be realised in a half year."

7. The Inspector while sanctioning the levy shall have to specify the rate at which and the period for which the tax shall be levied. Though a power is granted to the Inspector to extend the period from time to time in order that the purpose for which tax is levied may be fulfilled, there is also a proviso under which the Panchayat may for sufficient reasons and with the approval of the sanctioning authority, alter the rate, suspend or cancel the levy of the tax within the period specified in the order. One further safeguard is that the proceeds of the tax shall form a separate fund earmarked for the purpose for which it is levied and a separate account shall be maintained for the transactions relating to the fund. These safeguards are sufficient to ensure that the tax levied by the local body is a reasonable one and related to the purpose for which it is levied. The sanctioning authority is given power to scrutinise whether the expenditure for the particular purpose could not be met out of the general revenue of the Panchayat without imposing this special levy. It is only for this purpose the proposal has to be accompanied by a statement showing the receipts and charges under the various heads of accounts for the three years, preceding the year in which the p oposal is made and the budget estimate for the year in which the proposal is made and the particulars of the approximate or estimated cost of the work in respect of which the tax is proposed to be levied, and the amount of tax likely to be realised in a half year. Consequently, I am of the opinion that even though the statutory provision itself does not prescribe either the rate of tax or the maximum rate subject to which alone the tax can be levied, still necessary legislative purpose and intent has been disclosed and the safeguards against unreasonable levy have been provided. The decision of the Supreme Court in *Municipal Corporation of Delhi* v. *B.C.S. & W. Mills*[1], fully covers and applies to this case. In that case in paragraph 29 of the majority judgment, it has been stated as follows :

" What form the guidance should take is again a matter which cannot be stated in general terms. It will depend upon the circumst nces of each statute under consideration; in some cases guidance in broad general terms may be enough, in other cases more detailed guidan e may be necessary. As we are concerned in the present case with the field of taxation, let us look at the nature of guidance necessary in this field. The guidance may take the form of providing maximum rates of tax upto which a local body may be given the discretion to make its choice, or it may take the form of providing for consultation with the people of the local area and then fixing the rates after such consultation. It may also take the form of subjecting the rate to be fixed by the local body to the approval of Government which acts as a watch-dog on the actions of the local body in this matter on behalf of the Legislature. There may be other ways in which guidance may be provided. But the purpose of guidance whatsoever it may be, the manner thereof, is to see that the local body fixes a reasonable rate of taxation for the local area concerned. So long as the Legislature has made provision to achieve that reasonable rates of taxation are fixed by local bodies, whatever may be the method employed for this purpose, provided it is effective it may be said that there is guidance for the purpose of fixation of rates of taxation. The reasonableness of rates may be ensured by fixing a maximum beyond which the local bodies may not go. It may be ensured by providing safeguards laying down the procedure for consulting the wishes of the local inhabitants. It may consist in the supervision by Government of the rate of taxation by local bodies. So long as the law has provided a method by which the local body can be controlled and there is provision

1. (1969) 1 S.C.J. 621 : (1968) 3 S.C.R. 251 : A.I.R. 1968 S.C. 1232.

to see that reasonable rates are fixed it can be said that there is guidance in the matter of fixing rates for local taxation. As we have already said, there is preminently a case for delegating the fixation of rates of tax to the local body and so long as the Legislature has provided a method for seeing that rates fixed are reasonable, be it in one form or another, it may be said that there is guidance for fixing rates of taxation and the power assigned to the local body for fixing the rates is not uncontrolled and uncanalised. It is on the basis of these principles, that we have to consider the Act with which we are concerned."

The Judgment after referring to the terms of section 150 of the Delhi Municipal Corporation Act, the validity of which was challenged, then proceeded to enumerate the circumstances which, in the opinion of the Supreme Court, afforded reasonable guidance for the levy of the tax. The first circumstance which the Supreme Court pointed out was that the delegation had been made to an elected body responsible to the people including those who paid taxes. The Supreme Court stated: "The councillors have to go for election every four years. This means that if they have behaved unreasonably and the inhabitants of the area so consider it they can be thrown out at the ensuing elections. This is in our opinion a great check on the elected councillors acting unreasonably and fixing unreasonable rates of taxation. This is a domocratic method of bringing to book the elected representatives who act unreasonably in such matters...... This check which is inherent in an elected municipal body must enter into the verdict whether the delegation to such a body even though it is wide in extent, can be upheld on the basis that this is a method of controlling the actions of the elected body and setting a limit to which it can go in the matter of taxation even though no maximum as such is provided in the Act". The second circumstance referred to by the Supreme Court on the control on the limit of taxation" is to be found in the purposes of the Act. The present case stands on a better footing because the statute itself contemplates that the tax can be levied only for specific purposes and these specific purposes are enumerated in the rules framed under the statute. The third circumstance indicated by the Supreme Court is the necessity of adopting budget estimates each year as laid down in the other provisions of the Act. In the present case, there is a safeguard provided by the rules in the form of the requirement that the Panchayat should send along with the proposal to the sanctioning authority, its budget estimate for the year in which the proposal is made. The fourth circumstance indicated by the Supreme Court is that the maximum rates fixed by the Delhi Municipal Corporation at its meeting by a resolution had to be submitted to the Government for its sanction and without such sanction there can be no imposition of tax. In the present case, the proposal for the taxation has to be submitted to the Inspector through the Revenue Divisional Officer and without his sanction the tax cannot be levied. The fifth and the last circumstance which the Supreme Court referred to is that " there is another check on the power of the Corporation which is inherent in the matter of exercise of power by subordinate public representative bodies such as municipal boards. In such cases if the act of such a body in the exercise of the power conferred on it by the law is unreasonable the Courts can hold that such exercise is void for unreasonableness."

8. All these circumstances pointed out by the Supreme Court will clearly apply to the present case and in the light of that judgment, it cannot be contended that section 119 (3) of the Act is unconstitutional on the ground of excessive delegation. Consequently, the only contention raised by the learned Counsel for the petitioner fails. The Writ Petitions fail and are dismissed. There will be no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, C. J. and A. Varadarajan, J.*

The Settlement Officer, Salem and others .. *Appellants**

v.

K. V. Krishna Iyer and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *sections* 11, 67—*Limitation Act (XXXVI of* 1963), *section* 5—*Grant of patta—Order of Assistant Settlement Officer—Revision therefrom—Delay in filing—Power to condone—Whether available to the Settlement Officer or the Director of Settlements—Application of section* 5 *of Limitation Act expressly excluded—Delay cannot be condoned.*

In respect of a revision from an order of the Assistant Settlement Officer granting patta under section 11 of Madras Act (XXVI of 1948), there is no power in the Settlement Officer or the Director of Settlements to condone a delay in filing the revision petition. [*Para.* 1.]

The application of section 5 of the Limitation Act, has been expressly excluded by a specific rule which requires the filing of a revision petition to the Settlement Officer or to the Director within a specified time. That means, neither the Settlement Officer nor the Director of Settlements has the power to condone the delay under section 5 of the Limitation Act. [*Para.* 1.]

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ismail dated 5th January, 1970 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2232 of 1968 presented under Article 226 of the Constitution calling for the records relating to order in B. P. Petition No. 253 of 1968 dated 3rd May, 1968 of the 4th respondent therein and to quash the same.

Government Pleader, for Appellants.

S. Jagadeesan, for Respondents.

* W.A. No. 98 of 1917. 10*th January,* 1974.

The Court delivered the following

JUDGMENT.—The question in this case is whether in respect of a revision from an order of the Assistant Settlement Officer granting patta under section 11 of Madras Act XXVI of 1948, there is in him or the Director of Settlements, the power to condone a delay in filing the revision petition. Ismail, J., held that there is no such power. We are in entire agreement with this view. A specific rule has been framed under the rule-making power provided in section 67 with reference to section 11 that the revision petition to the Settlement Officer or a revision to the Director should be filed within a specified time. The application of section 5 of the Limitation Act has been expressly excluded. That means, neither the Settlement Officer nor the Director of Settlements has the power under section 5 of the Limitation Act to condone the delay.

2. It is true that there is no limitation provided for a revision under section 5 or section 7 of the Act. But the order in the instant case will not fall within the purview of the power under section 5 or section 7, because of the specific provision providing for a revision against orders passed under section 11 of the Act. The special excludes the general.

3. The appeal is dismissed. No costs.

S.J. *Appeal dismissed.*

[NOTE.—The judgment under appeal was that of *Ismail, J.* which was as follows :

(W.P. No. 2232 of 1968 5th January, 1970).

4. The Assistant Settlement Officer, Salem on 30th June, 1967 passed an order allowing a ryotwari patta to the petitioner herein in respect of S. No. 64/4 por. measuring O. 69 acre in Meyyanur village in Salem taluk and District. Against this order, the first respondent herein preferred a revision petition to the Settlement Officer, Party No. III, Madras-7, on 16th September, 1967. The Settlement Officer found, after deducting the time taken for obtaining the certified copy of the order of the Assistant Settlement Officer, that the revision petition was filed after 43 days from the date of the order of the Assistant Settlement Officer. Since the

prescribed period of limitation was only 30 days and the revision petition was filed after a delay of 13 days, he stated that the delay had not been properly explained and, therefore, by an order, dated 10th October, 1967 rejected the revision petition *in limine.* Against the order, the first respondent herein preferred a revision petition to the Director of Settlements, Madras-5. The Director of Settlements, Madras-5, by an order, dated 5th March, 1968 purporting to act under section 5 (2) of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) hereinafter referred to as the Act condoned the delay, set aside the order of the Settlement Officer, Salem, and remanded the case to him for fresh disposal on merits. The petitioner herein preferred a revision petition to the Board of Revenue against this order of the Director of Settlements and the Board by its order, dated 3rd May, 1968 dismissed the revision petition. It is, thereafter, the petitioner has filed the present writ petition praying for the issue of a writ of *certiorari* to quash the order of the Director of Settlements as confirmed by the Board of Revenue.

5. The point that is raised in this writ petition lies in a very narrow compass. Pursuant to section 67 (2) (*d*) of the Act, the Government in G. O. No.3190, Revenue, dated 17th October, 1955, made the following rule :

> "Revision petitions against the orders of an Assistant Settlement Officer under section 11 of the said Act shall be presented to the Settlement Officer concerned within fifteen days from the date of conduct of Rough Patta Objection Hearing or the date of publication of this notification, whichever is later, in the areas where section 11 enquiries have already been conducted separately under the old procedure and within thirty days of the conduct of final settlement enquiry or within fifteen days of the date of publication of this notification, whichever is later in areas where section 11 enquiries are conducted along with the Rough Patta Objection Hearing under the new procedure. Further revision petitions shall lie to the Director of Settlements and the Board of Revenue against the orders of the Settlement Officer and the Director of Settlement respectively within thirty days of the date of their respective orders. *Explanation*—Section 5 of Indian Limitation Act, 1908 (Central Act IX of 1908) shall not apply to revision petitions coming within the purview of this rule."

Thus it will be seen that for preferring a revision petition to the Settlement Officer the period of limitation prescribed is only 30 days and this rule expressly states that section 5 of the Indian Limitation Act shall not apply to revision petitions coming within the purview of this rule. That means, once a revision petition is filed beyond the period of limitation prescribed in the rule, the Settlement Officer will have no jurisdiction whatever to entertain the same, and to deal with the same on merits. It is only because of this provision the Settlement Officer dismissed the revision petition of the first respondent *in limine.* However, the Director of Settlement when he interfered with the order of the Settlement Officer stated that he was competent to condone the delay by virtue of section 5 (2) of the Act. I am of the opinion that the Director of Setlements committed a patent error of law in coming to this conclusion. Section 5 (2) of the Act merely states :

> "Every Settlement Officer shall be subordinate to the Director and shall be guided by such lawful instructions as he may issue from time to time ; And the Director shall also have power to cancel or revise any of the orders, acts or proceedings of the Settlement Officer, other than those in respect of which an appeal lies to the Tribunal."

In my opinion, this section itself does not give power to the Director of Settlements while revising the order of the Settlement Officer, to do what the Settlement Officer himself cannot do. Whenever an appellate authority, or a revisional authority interferes with an order of the lower authority and passes an order, that authority passes the order which in its opinion the lower authority ought to have passed in accordance with law. If the lower authority had no power to condone the delay the appellate authority cannot condone that delay occurring before the lower

authority and on that ground set aside the order of the lower authority. That is exactly what the Director of Settlements had done in the present case. No doubt, by G.O. No. 139, Revenue, dated 9th January, 1963 the Government in exercise of the powers conferred by clause (6) of sub-section (2) of section 67 read with sub-section (2) of section 5 and clauses (c) and (d) of section 7 of the Act made the following rule:

"1—(1) Any person who objects to any of the orders, acts or proceedings of a Settlement Officer, other than those in respect of which an appeal lies to the Tribunal, may prefer a revision petition to the Director:

(2) Any such petition shall be preferred within one month from the date on which these rules are published in the *Fort St. George Gazette* or within two months from the date of communication of the order or proceeding of the Settlement Officer, whichever of the dates aforesaid is the latest:

Provided that the Director may admit a petition preferred after the period aforesaid if he is satisfied that the petitioner had sufficient cause for not preferring the petition within the said period."

But the proviso to sub-rule (2) merely enables the Director to admit the petition preferred after the period of limitation prescribed for preferring such a revision petition to him and certainly this proviso does not enable the Director to condone the delay occurring in the revision petition preferred to the Settlement Officer, who himself had no power to condone the delay. As a matter of fact, it is this confusion that has been responsible for the orders passed by the Director and the Board in this particular case. It is conceded that the Settlement Officer by virtue of the explanation to the rule extracted already had no power to condone the delay. If he had no power to condone the delay, neither the Director of Settlements, nor the Board of Revenue had any power to condone that delay and on that basis set aside the order of the Settlement Officer and to remand the matter to the Settlement Officer. I may point out again that the power to condone the delay available to the Director of Settlements is a power to condone the delay in preferring a revision petition to him beyond the period of limitation prescribed therefor and not a power to condone the delay in preferring a revision petition to the Settlement Officer, which the Settlement Officer himself had no power to condone.

6. Looked at from another point of view also the orders of the Director of Settlements and the Board of Revenue are erroneous in law. As I pointed out earlier, both the Director of Settlements and the Board of Revenue relied on section 5 (2) of the Act and obviously on the rule made by the Government in G.O. No. 139, Revenue, dated 9th January, 1963. I am of the opinion that the said section 5 (2) and the rule referred to have no application to the revision petition preferred by the first respondent to the Director of Settlements. The rule made by the Government in G.O. No. 3190, Revenue, dated 17th October, 1955 itself provides for revision petitions to the Director of Settlements and the Board of Revenue and also prescribes the period of limitation therefor, in respect of orders made under section 11 of the Act. Hence, section 5 (2) is a general provision, while the rule made by Government in G.O. No. 3190, Revenue, dated 17th October, 1955 is a special provision dealing with the orders made under section 11 of the Act. On the general principle that a special provision excludes the applicability of the general provision, with regard to the orders made under section 11 of the Act, it is the rule mentioned above that is exclusively applicable. Therefore, the explanation to the rule excluding the application of section 5 of the Limitation Act, will govern even the revision petitions preferred to the Director of Settlements and the Board of Revenue, against the orders of the Settlement Officer in revision preferred against the order of the Assistant Settlement Officer made under section 11 of the Act. Consequently, even the Director of Settlements had no power to condone the delay in preferring the revision petition to him falling under the rule made in G.O. No. 3190, Revenue, dated 17th October, 1955.

7. Under these circumstances, the writ petition is allowed and the impugned

orders of the Director of Settlements and the Board of Revenue are quashed. There will be no order as to costs.]

S.J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(Special Original Jurisdiction.)
PRESENT:—*K. N. Mudaliyar, J.*

Messrs. Best and Company Private Limited, Madras-1 .. *Petitioner**

v.

The Presiding Officer, Labour Court, (Additional), Madras-1 and others .. *Respondents*

Industrial Disputes Act (XIV of 1947)—Madras Industrial Disputes Rules, rule 55—Award of Labour Court—Silent as to reinstatement—Reference to back-wages only—Interpretation—Scope of rule 55.

Reinstatement is the general rule in the wake of a finding of illegal dismissal. Should there be any exception it is for the person pleading it to establish the same. In the absence of proof of any overt act of disturbance of industrial peace or production the normal rule of reinstatement must be followed. [*Para.* 2.]

The non-mention of a direction in the award for reinstatement is, in the circumstances of the case, only an accidental slip or omission. [*Para.* 3.]

Section 152, Civil Procedure Code and rule 55 of the Madras Industrial Disputes Rules and section 66 of the Uttar Pradesh Industrial Disputes Act are in *pari materia* and similar language is used in all of them. Rule 55 vests the Labour Court with the power to correct any error arising from an accidental slip or omission in its award with the concomitant and consequential power of granting relief of reinstatement with back wages. [*Paras.* 4 *and* 6.]

Cases referred to :—

Hindustan Steels v. *A. K. Roy*, (1970) 1 L.L.J. 228 : (1970) 3 S.C.R. 343 ; (1970) 2 S.C.J. 77 : A.I.R. 1970 S.C. 1401 ; *Tulsipur Sugar Co.* v. *State of Uttar Pradesh*, (1970) 1 S.C.J. 137: (1970) 1 S.C.R. 35. A.I.R. 1970 S.C. 70 ; *Shanmugham* v. *Presiding Officer, Labour Court, Madras*, (1963) 1 M.L.J. 331.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.A. No. 608 of 1971 in I.D. No. 140 of 1968 on the file of the Labour Court (Additional), Madras and quash its order, dated 1st February, 1972 passed therein.

M. R. Narayanaswami, for Petitioner.

T. S. Ramaswamy, for Respondents.

The Court made the following

ORDER.—This writ petition filed by the petitioner is directed against the order of the Labour Court, Madras, dated 1st February, 1972 passed in I.A. No. 608 of 1971 in I.D. No. 140 of 1968.

2. A brief recital of facts leading to the present writ petition would be helpful for a proper conclusion in this matter. One Murugesan was dismissed by the petitioner on 23rd May, 1968. All the other workmen in the employment of the petitioner struck work from 23rd May, 1968 protesting against the dismissal of Murugesan. Although the strike was illegal in view of the pendency of I.D. No. 60 of 1967 on the file of the Labour Court, Madras, and I.D. No. 64 of 1967 on the file of the Industrial Tribunal, Madras, it continued. On 29th June, 1968 the question relating to the dismissal of Murugesan was referred for industrial adjudication to the Labour Court, Madras. Even subsequently, the strike was not called off. On the contrary, the workmen continued the strike. The petitioner published in the various dailies in the City a notice that if they did not report to duty, their services would be terminated. There was a settlement (Exhibit M-22) under section 12 (3) of the Industrial Disputes Act before the Special Deputy Commissioner of Labour, reserving the case of 84 workmen mentioned in the Annexure to the settlement for being proceeded under the Industrial Disputes Act. The workmen, who had already reported by then, were

* W.P. No. 666 of 1972. 13th February, 1973.

taken back to employment. The others were given time to report to duty till 3rd October, 1968. On 4th October, 1968, there was an order of reference for adjudication regarding 84 persons, in I.D. No. 140 of 1968, before the Labour Court, Madras. During the pendency of the proceedings before the Labour Court, Madras, 80 out of 84 persons settled their accounts with the Management, and did not press for reinstatement. Only the remaining four agitated for their reliefs before the Labour Court. On 29th November, 1969, the Labour Court gave the award in I.D. No. 140 of 1968. At this stage, it would be relevant to set down below the operative part of the award:

"For all these reasons, I hold that the non-employment of the 4 workmen, namely, Raman, Krishnan, Thiruvengadam and Karunakaran is not justified. In the matter of back wages, I find that the other workers who had been taken back were not given wages for the period of strike. They had been directed to report for work not later than 3rd October, 1968. Therefore, the other workers would have got their pay from the date of the joining duty after 27th September, 1968. Back-wages must therefore be allowed to these 4 workers also from a date after 27th February, 1968 the date of Exhibit D-22 and prior to 3rd October, 1968. Therefore backwages is awarded to these 4 workers from 1st October, 1968. The non-employment of the remaining 80 workmen does not arise for consideration as they had since settled their claims with the management. For all these reasons, I hold under this issue that the non-employment of the 4 workers, namely, Raman, Krishnan, Thiruvengadam and Karunakaran is not justified and that they are entitled to backwages from 1st October, 1968. An award is passed accordingly. No costs."

The petitioner questioned the propriety or legality of the award, dated 29th November, 1969, *M/s. Best and Company (Private) Limited* v. *Presiding Officer, Labour Court, Madras and another*[1], on the file of this Court. Palaniswamy, J., held as follows:—

"Though the Labour Court found that the non-employment was not justified, it did not give any reasons for not giving a direction to reinstatement. It merely stated that the workmen were entitled to backwages from 1st October, 1968; when this was mentioned in the course of the arguments it was almost surprising to Mr. Ramaswami, learned Counsel for the second respondent union. He pointed out that after the award was passed, a letter was written to the petitioner management by the four workmen stating that in view of the award, they should be reinstated and that the petitioner management replied stating that in view of the writ petition, the request could not be complied with. He submitted that having regard to that reply it was taken that the award in fact had directed reinstatement and that having regard to the filing of the writ petition the workmen did not pursue the matter further. Mr. Narayanaswami appearing for the petitioner management contended that the workmen should have moved the Labour Court for amendment of the award and that not having done so, the award should be taken as it is. I do not wish to say anything on this controversy which may prejudice the rights of the workmen or the petitioner-management in regard to whatever proceeding may be taken for amendment of the award. I find that the conclusion of the Labour Court that the non-employment of the four workmen was not justified, is correct. In this view, the writ petition is dismissed. No order as to costs."

From the foregoing discussion, it is patently clear that Palaniswamy, J., gave the finding that the conclusion of the Labour Court that the non-employment of the four workmen was not justified, is correct. My learned brother (Palaniswamy, J.) also made mention of the contention of the Counsel for the petitioner that the workmen should have moved the Labour Court for amendment of the award. But no opinion was expressed by my learned brother on the subject-matter of the controversy. The respondents 2 and 3 (K. Raman and Karunakaran) filed an

1. W.P. No. 136 of 1970.

application I.A. No. 608 of 1971 in I.D. No. 140 of 1968 praying for amending the award in I.D. No. 140 of 1968, dated 29th November, 1969, seeking for reinstatement. The petitioner herein filed a counter before the Labour Court on 10th December, 1971 questioning the position taken by the respondents 2 and 3 herein that when once the non-employment of the respondents 2 and 3 was not justified, it would automatically follow that the workmen should be deemed to be in service, and that they are entitled to reinstatement. The petitioner even questioned such a power in the Labour Court in view of the language of rule 55 of the Madras Industrial Disputes Rules. Subsequently, Raman and Karunakaran (respondents 2 and 3 herein) prayed for permission to amend the prayer in the petition, in I.A. No. 682 of 1971, for correcting the error, instead of amending the award. The petitioner reiterated his stand that rule 55 of the Madras Industrial Disputes Rules, would not warrant such an amendment. The counter and the additional counter filed by the petitioner are dated 10th December, 1971 and 3rd January, 1972, respectively. The Labour Court finally passed the order correcting the prior award in I.D. No. 140 of 1968 by adding the clause that the respondents 2 and 3 herein Thiru Raman and Karunakaran would be entitled to an order of reinstatement apart from the other reliefs mentioned in the award, dated 29th November, 1969. The present writ petition is directed with a prayer for quashing the order of the Labour Court, dated 1st February, 1972.

2. Mr. M. R. Narayanaswami, the learned Counsel for the petitioner, raised two arguments. Firstly, his argument is that it is only a clerical error that can be corrected under rule 55 of the Madras Industrial Disputes Rules, that the granting of the relief of reinstatement does not necessarily follow the finding of illegal dismissal, and that too automatically, that although the normal rule is reinstatement, in the wake of the finding of illegal dismissal, it cannot be applied to the facts of this case in respect of the two respondents, that the phrase "back-wages" found in the operative part of the award, dated 29th November, 1969 would be equated with or computed in terms of (monetary) compensation, and that the definiteness of the amount of compensation can be arrived at by quantifying the wages with effect from 1st October, 1968. In support of this argument, the learned Counsel relied on the rationale found in the judgment of the Supreme Court of India in *Hindustan Steels* v. *A. K. Roy*[1]. He relied on a catena of cases found in paragraph 10 of the Judgment of the Supreme Court, wherein an exception was made to the general rule of reinstatement. I am afraid I am unable to see any merit in this argument. The very judgment of the Supreme Court, on which the learned Counsel relied, mentions reinstatement as the general rule. Should there be any exception, it is for the petitioner to prove the fact of strained relations between the employer and the employee or where the employee holds a position of trust and confidence, to prove that it has been betrayed by the workman by acts of malfeasance and misfeasance or otherwise, or prove any other activity on the part of the workmen (respondents 2 and 3), which would be prejudicial either to the industrial harmony or to the Industrial production. I asked the learned Counsel for the petitioner whether there was any material in proof of any of these overt acts of respondents 2 and 3 that was adduced by the management (petitioner) before the Labour Court. Nothing was shown to me. I again asked the learned Counsel to show me at least an averment, if not evidence, in support of any strained relationship between the employer and the employee, whose reinstatement is likely to endanger or imperil industrial peace or production. Nothing was shown even by way of an averment. On the contrary, the learned Counsel for the workmen placed strong reliance on a certain portion of the award of the Labour Court, which runs as follows :—

> "The negotiations had culminated in the memorandum of Exhibit M-22, dated 27th September, 1968. The records in this case do not disclose that any particular reason was advanced by the management for insisting on the dismissal of these 84 workmen from

1. (1970) 1 L.L.J. 228 at pp. 232 and 233: (1970) 3 S.C.R. 343: (1970) 2 S.C.J. 77: A.I.R. 1970 S.C. 1401.

out of the 668 workers. With the records and evidence available in this case one must proceed on the basis that all these 669 workers in the employment of the management concern participated in the strike. At no stage of the dispute the management ever pleaded that the 84 workmen had indulged in violence or obstructed the loyal workers from attending to work. My attention was not drawn to any aggravating circumstances in the case of the 84 workmen. In short, the management did not endeavour to show that there was any rational basis for insisting on the dismissal of the 84 workmen alone. I must reiterate that the management had not sought to justify the discrimination on any tenable grounds even in this Court ".

To the mind of the Labour Court, this aspect of the matter was present, and the Labour Court gave a categorical finding that at no stage of the dispute the management ever pleaded that the 84 workmen (including the two respondents herein) had indulged in violence or obstructed the loyal workmen from attending to work. Therefore, I am bound to proceed on the footing, particularly, in the absence of any proof of any overt act of any disturbance of industrial peace or production by the respondents 2 and 3, that the normal rule of reinstatement, which is laid down by the Supreme Court in paragraph 9 of its judgment in *Hindustan Steels* v. *A. K. Roy*[1], must be followed. If that be the position in the eye of law, the next question that falls for consideration is whether rule 55 of the Madras Industrial Disputes Rules, vests the Labour Court with the power to amend its prior award, or, in other words, whether the Labour Court has got the concomitant and consequential power of granting the relief of reinstatement with backwages. The concept of backwages, is, in my view, inseparably linked with reinstatement. You do not give to the employee backwages in terms of compensation. One gives compensation to the employee when he severs his connection with the employer or when his reinstatement is found to be neither expedient nor desirable. To my mind, back wages cannot march with the phrase " monetary compensation ". The very concept carries with it the incidence of reinstatement : divorced from the idea of reinstatement, " back wages " would be a phrase without a meaning.

3. I set down here rule 55 of the Madras Industrial Disputes Rules :

> " A Labour Court or Tribunal or an Arbitrator may correct any clerical mistake or error arising from an accidental slip or omission in any award or order. Any such correction in relation to any award, if made after the award is published, shall also be published in the same manner as the original award."

I would rely on the significant clause which runs as follows :

> " error arising from an accidental slip or omission in any award or order."

The Labour Court found the dismissal of the two respondents as unjustified. This finding of the Labour Court has been affirmed by Palaniswamy, J., in *M/s. Best and Company (Private) Limited* v. *Presiding Officer, Labour Court, Madras and another*[1]. Mr. Narayanaswami, the learned Counsel for the petitioner, fairly told the Court that he cannot go behind this finding, and question the propriety of the same, at the very commencement of his argument. Acting on his finding, the only other question is whether the non-mention of a direction for reinstatement of the respondents 2 and 3 is an accidental slip or omission in the award or order. In my view, it is so undoubtedly, for the Labour Court awarded backwages with effect from 1st October, 1968 without placing any limitation about the last date upto which it must be computed in terms of money. The argument of Mr. Narayanaswami, in my view, suffers from this infirmity. Even assuming for one moment that it is the quantification of backwages (which may be equated with compensation) with which the Labour Court was concerned, particularly in the background of other 80 workers who got the settlement from the manage-

1. (1970) 1 L.L.J. 228 : (1970) 3 S.C.R. 343 : (1970) 2 S.C.J. 77 : A.I.R. 1970 S.C. 1401.

1. W.P. No. 136 of 1970.

ment, any quantification of backwages, in my view, mutst be from a certain date to a certain date. But the Labour Court has not given the last date upto which the quantification could be made. This would be another factor, which would strongly weigh with this Court in finding that the absence of a direction for reinstatement is only an accidental slip or omission in the original award.

4. Section 152, Civil Procedure Code, rule 55 of the Madras Industrial Disputes Act and section 66 of the United Provinces Industrial Disputes Act, 1947, on a comparison of the language employed in them, are *in pari materia*. A similar language is employed in all these three enactments. The learned Counsel for respondents 2 and 3 relied on a passage, which is extracted here below, from the judgment of the Supreme Court in *Tulsipur Sugar Company* v. *State of Uttar Pradesh*[1]:

> " Laying down by implication the time limit during which the correctional jurisdiction under section 6 (6) can be exercised upto the time of the award becoming final under section 6 (5) or becoming enforceable under section 6-A creates difficulties, besides, it would appear, being contrary to the provisions of these two sections and is therefore not commendable. The correctional jurisdiction conferred on the adjudicating authority under section 6 (6) is in terms identical with the one conferred under section 152 of the Code of Civil Procedure and rule 28 of the Industrial Disputes (Central) Rules, 1957, and is in consonance with the first and foremost principle that no party should suffer any detriment on account of a mistake or an error committed by an adjudicating authority. The circumstance that the proceedings before a Labour Court and a Tribunal are deemed to be concluded under section 6-D when their award becomes enforceable or that thereupon they become *functus officio* would also be no ground for inferring any limitation of time in section 6 (6), for, that would also be the case in the case of a civil Court or an adjudicating authority, under the Industrial Disputes Act, 1947, even without a provision like section 6-D and yet the Legislature has not chosen in the case of either of them to lay down any limitation of time for exercising its correctional jurisdiction. In our view, there are no compelling reasons to read into section 6 (6) any such limitation by implication."

1. (1970) 1 S.C.J. 137 : (1970) 1 S.C.R. 35 : A.I.R. 1970 S.C. 70.

5. Mr. Ramaswami, argued that the two respondents ought not to suffer any detriment on account of a mistake, or error committed by the Labour Court. His argument further ran as follows: It is only the correctional jurisdiction that the Labour Court has exercised, and in the circumstances of the case, the Labour Court was justified in doing so. In view of the rationale found in the judgment of the Supreme Court, I have no hesitation in accepting the argument that the Labour Court very properly exercised its correctional jurisdiction, and, more so, in my view, in the interests of justice.

6. The learned Counsel for the petitioner argued that the order in *M/s. Best and Company (Private) Limited* v. *Presiding Officer, Labour Court, Madras and another*[1], was delivered by the High Court on 2nd April, 1971, but the two respondents have chosen to move the Labour Court for amending the award only in the month of September, 1971 ; this long delay would constitute laches on the part of the workmen, and they are not entitled to any discretionary relief in terms of rule 55 of the Madras Industrial Disputes Rules. The petitioner did not raise any objection as to delay before the Labour Court at any time. I do not find any provision for limitation of time for exercising the correctional jurisdiction of the Labour Court. The Legislature has not provided for such an eventuality. In the absence of such a provision, Courts cannot place an embargo on the right of the workman to approach the Labour Courts for correcting any error arising from an accidental slip or omission in any award or order. Should the Courts embark on such a task, there will not be any uniformity in laying down the law of limitation for each Judge may conceive of a certain

1. W.P. No. 136 of 1970.

period of time to be bar of limitation. When the Legislature has not chosen to do so, Courts cannot embark on an implied judicial legislation towards such an end.

7. The learned Counsel for the respondents 2 and 3, relied on the rationale found in the judgment of Veeraswami, J., (as he then was), reported in *Shanmugham* v. *Presiding Officer, Labour Court, Madras*[1], which lays down :

> " When the Labour Court found that the dismissal was improper and that it so declared, the effect of it was that the petitioner should be deemed to have continued in service."

Relying on this proposition, the learned Counsel contended that these two respondents are deemed to have continued in service, and, therefore, they are entitled to reinstatement with the inevitable corollary of backwages awarded already by the Labour Court to them, and, therefore, the reinstatement is only a natural consequence of the finding of the Labour Court, which held that the dismissal of the two respondents is unjustified, — a finding affirmed by the High Court.

8. The writ petition is dismissed with costs.

P.S.P. ——————*Petition dismissed.*

1. (1963) 1 M.L.J. 331.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam and V. Ramaswami, JJ.*

State of Madras represented by the Deputy Commissioner (CT) Madras Division, 53/1, Peters Road, Madras-6 .. *Petitioner**.

v.

The Trustees of Port of Madras, represented by the Chairman, Port Trust Administrative Buildings, South Beach Road, Madras-1 .. *Respondents.*

Madras General Sales Tax Act (I of 1939)—Transactions of sale of unserviceable or unclaimed articles by Port Trust—Whether chargeable under the Act—Meaning of " business ", " dealer "—Port Trust not a department of Central Government.

In selling unclaimed and unserviceable articles the Port Trust effects sales only in enforcement of its lien for recovery of the rates and rents payable in respect of such goods, and it is not the owner of the goods sold at any time nor do the sale proceeds become the property of the Port Trust. It cannot be said that the Port Trust sells the unclaimed goods either as a commercial venture or as a dealer.
[*Paras.* 4, 5 *and* 6.]

The Madras Port Trust is a statutory body constituted by the Madras Port Trust Act, 1905, and though it is subject to certain control by the Central Government under the provision of that Act it cannot be said to be a department of the Central Government and cannot come within the scope of the Explanation to section 2 (*g*) of the Madras General Sales Tax Act under the term "local authority."

Even if the Port Trust were to be taken as a local authority, still it cannot be treated as a dealer unless it carries on the business of buying and selling etc.
[*Paras.* 7 *and* 8.]

Cases referred to :—

State of Tamil Nadu v. *Burmah-Shell Co., Ltd.*, (1973) 31 S.T.C. 426 : (1973) I

*T.C. Nos. 35 and 36 of 1970.
(R. Nos. 34 and 35 of 1970) .. 24*th July*, 1973.

S.C.W.R. 720 : (1973) Tax L.R. 1739 : A.I.R. 1973 S.C. 1045 ; *Director of Supplies and Disposals* v. *Board of Revenue, West Bengal, Calcutta,* (1967) 20 S.T.C. 398 : (1967) 2 I.T.J. 847 : (1968) 1 S.C.J. 792 : (1967) 3 S.C.R. 778 : A.I.R. 1967 S.C. 1826 ; *Tirumala-Tirupati Devasthanam* v. *State of Madras,* (1972) 29 S.T.C. 266 ; *Andhra Pradesh State Road Transport Corporation* v. *Commercial Tax Officer, Hyderabad-III,* (1971) 27 S.T.C. 42 ; *Trustees of the Port of Madras* v. *State of Madras,* (1960) 11 S.T.C. 224 : I.L.R. (1960) Mad. 529 : (1960) 2 M.L.J. 86: (1960) Mad. L.W. 198.

Petitions under section 38 of the Act I of 1939 praying the High Court to revise the Order of the Court of the Sales Tax Appellate Tribunal (Main Bench) Madras, dated 9th May, 1969 and made in T.A. Nos. 799 and 798 of 1967 respectively preferred against the order of the Appellate Assistant Commissioner (CT) I, Madras City, relating to the assessment years 1964-65 and 1965-66 in Appeal Nos. 360 of 1966 dated 23rd December, 1966 and 399 of 1966, dated 4th January, 1967 respectively as against the order of the Deputy Commercial Tax Officer, Harbour I Division, Madras, in MGST No. 360 of 1964-65, dated 8th August, 1966 and MGST No. 360 of 1965-66 dated 15th September, 1966 respectively.

K. Venkataswami, First Assistant Government Pleader, for Petitioner.

R. G. Rajan and *D. V. Sivagnanam,* for Respondents.

The Order of the Court was made by

Ramanujam, J.—These two cases relate to the same assessee and involve the same point. The assessee is the Madras Port Trust represented by its Chairman. The assessee was periodically effecting sales through M/s. Murray & Company, Auctioneers of unclaimed and unserviceable articles. For the assessment years 1964-65 and 1965-66, it has effected sales of such articles to the extent of Rs. 8,20,312-88 P. and Rs. 9,76,058-25 P. respectively. The assessing authority took the view that the sales of such articles effected by the assessee are taxable. In that view it determined the taxable turnover of the assessee for the year 1964-65 and 1965-66 at Rs.8,06,627-88 P. and Rs. 9,62,012-25 P respectively after rejecting the contention of the assessee that such sales are not in the course of carrying on of a business activity as contemplated by the provisions of the Madras General Sales Tax Act, 1959 (hereinafter called as the Act).

2. The Assessee thereafter appealed to the Appellate Assistant Commissioner, but without success. On further appeal to the Sales Tax Appellate Tribunal, the Tribunal held that the assessee is neither a dealer as defined in the Act nor does it carry on any business activity in the commercial sense or with any profit motive and that, therefore, the sales of unserviceable and unclaimed articles could not be brought to charge under the Act. Aggrieved against the order of the Tribunal, the State has come before this Court.

3. It is contended on behalf of the Revenue that the sales of unclaimed and unserviceable articles in question have taken place after the definition of " business " has been amended by Madras Act XV of 1964 and that, therefore, whether or not the assessee has effected sales in the course of a business activity or with a profit motive, the sales will become taxable in the light of the amended provision of the definition of " business " and that this position is clear from the decision of the Supreme Court in *State of Tamil Nadu* v. *Burmah-Shell Company Limited*[1]. According to the learned Government Pleader, the periodical sales of unclaimed and unserviceable articles by the assessee would partake the character of a business activity and, therefore, whether there is a profit motive or not, the sales could validly be taxed.

4. It is true that after the amendment of the definition of "business" by Madras Act XV of 1964 all commercial transactions whether carried on with profit motive or not or whether or not any profit accrues from such transactions are included in that definition. But the question is whether the sales effected by the assessee can be taken to be commercial transactions so that they can be said to be " in the course of business ". The assessee is a statutory body constituted for the purpose

1. (1973) 31 S.T.C. 426: (1973) 1 S. C.W.R. 720: (1973) Tax L.R. 1739: A.I.R. 1973 S.C. 1045.

of performance of certain statutory duties by the provisions of the Madras Port Trust Act, 1905. The preamble to the said Act sets out the object the Act as regulation, conservancy and improvement of the Port of Madras. Section 39 of the Act sets out the service to be rendered by the Port Trust in relation to all goods received or taken custody of by the Port Trust, either in the course of export or in the course of import. Section 42 provides the scale of rates for and the conditions under which any of the services specified in section 39 are to be performed. Section 44 states that the prior sanction of the Central Government has to be obtained for the scale of rates to be charged, and the conditions subject to which the services are to be performed. Section 51 creates a lien over the goods for the amount of rates leviable under the Act in respect of those goods. Section 56 empowers the Port Trust, after the expiry of a specified time, to sell by public auction, so much of the goods as may be necessary to recover the amount of rates remaining unpaid. Section 58-A also empowers the Port Trust to sell the goods which have not been removed from its premises within a limited time, by public auction, after giving notice of sale to the owner of the goods. Section 59 provides as to how the proceeds of every sale conducted under section 56 or section 58-A shall be applied. Section 62 provides that if the proceeds of sale are insufficient to cover the rates, damages, expenses, etc., payable to Port Trust, it may recover the balance by resorting to the alternative remedy by way of suit. The above provisions clearly indicate that the Port Trust at no time became the owner of the goods, nor did it effect the sales as per the directions of the owners of the goods. The sales have been effected by the Port Trust only in exercise of its statutory right to recover its dues by enforcing its right of lien on the goods and the sale proceeds never became the property of the Port Trust. In the light of the above position, it cannot be said that the Port Trust has sold the unclaimed goods either as a commercial venture or as a dealer. Even in the face of the amended definition of "business", unless the Port Trust is treated as a dealer carrying on the business of selling, supplying or distributing the goods, as a commercial venture its sales in the course of the exercise of its statutory duties are not assessable. Therefore, the sales of unclaimed or uncleared goods by the Port Trust cannot be considered as sales effected by a "dealer".

5. Unserviceable goods said to have been sold by the Port Trust are old paper, iron, scraps, containers, dismantled structures, old trucks etc. The sales of such articles can of course be brought to charge by virtue of the amended definition of "business", if they have been effected by a dealer. But as already held the Port Trust cannot be considered to be a dealer engaged in a business or a commercial venture.

In *Director of Supplies and Disposals* v. *Board of Revenue, West Bengal, Calcutta*[1], their Lordships of the Supreme Court considered a somewhat similar question. In that case the Director of Supplies and Disposals was taxed on his sales of some surplus materials. It was found that the function of the Directorate of Supplies and Disposals was to dispose of the surplus goods and to purchase goods on behalf of the Government of India and that a considerable portion of the surplus materials left in India at the conclusion of the last war by the American Government which were no longer useful or have become obsolete were sold to the public in a series of transactions. The question there was whether the Director of Supplies and Disposals carried on the business of selling the goods and was a dealer within the meaning of section 2 (*c*) of the Bengal Finance (Sales Tax) Act, 1941. The Court held that though the expression "business" is a word of wide and indefinite import, there must be some real, systematic or organised course of activity or conduct with a set purpose of making profit, that the Director was merely disposing of the surplus material by way of realisation of its value and that, therefore, the transactions were not taxable as sales effected by a dealer.

6. As already stated, the Port Trust has effected the sales in question in enforcement of its lien for recovery of the rates and rents payable in respect of the goods, and that it was not the owner of the goods

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1. (1967) 20 S.T.C. 398: (1967) 2 I.T.J. 847: (1968) 1 S.C.J. 792: (1967) 3 S.C.R. 778: A.I.R. 1967 S.C. 1826.

sold at any time. To make a person a dealer as defined in the Act, he must have sold the goods either as owner or as one who has been authorised by the owner to sell on his behalf. When the Port Trust sells the goods in respect of which it had a lien, it cannot be said to have effected the sales of the goods as a dealer. Suppose a pawn broker sells the articles pledged with him in default of the owner redeeming the articles as agreed with a view to recover the amounts advanced by him, can it be said that he is a dealer engaged in the business of buying and selling the articles ? The answer can only be in the negative.

7. In a recent decision in *Tirumala-Tirupati Devasthanam* v. *State of Madras*[1], Ramaprasada Rao, J., has held that though the definition of business in section 2 (*d*) of the Madras General Sales Tax Act, 1959 as amended by the amending Act of 1964 is an inclusive one, yet only trading, commercial or manufacturing activities would come within the definition, that though the motive to make a profit behind such an activity is irrelevant under the definition, the essential base on which the definition rests is that the seller should be a trader or a person indulging in commerce or manufacturing activities, and that unless the nature of the activity of a person is so intricately connected with trade, commerce or manufacture, as popularly understood, such a person cannot be said to be a dealer carrying on business. According to the learned Judge the primary requisite necessary before a person can be characterised as a dealer within the meaning of section 2 (*g*) of the Act is that he should carry on a business venture. In that case silver and other valuable articles found in the Hundis of the temples of the Tirumala-Tirupati Devasthanam were sold in public auction with a view to convert them into cash. The question was whether such sales effected by the Devasthanam are liable to be taxed. It was held that the sales effected were only by way of converting the silver and other articles into cash and that the Devasthanam in effecting the sales was not indulging in a commercial activity or doing any business. The case before us so far as it relates to unclaimed goods is an *a fortiori* one, for in this case the articles sold by the Port Trust did not belong to it unlike in the case dealt with in *Tirumala-Tirupati Devasthanam* v. *State of Madras*[1], where the articles sold belonged to the Devasthanam.

1. (1972) 29 S.T.C. 266.

8. In *Andhra Pradesh State Road Transport Corporation* v. *Commercial Tax Officer, Hyderabad-III*[2], the Andhra Pradesh High Court had held that the sales of scrapped vehicles with tyres, old containers and other unserviceable materials effected periodically by the Andhra Pradesh Road, Transport Corporation constituted under the Road Transport Corporation Act, 1950 were not taxable on the ground that the Corporation was not a dealer carrying on business in those materials and that the Corporation is primarily constituted for operating an efficient road-transport service and it could not be held to be carrying on business of selling discarded materials which have come into its possession in the course of its activities. This decision was referred to and explained by the Supreme Court in *State of Tamil Nadu* v. *Burmah Shell Company Limited*[3], on the ground that the said decision was based on the fact that the State Road Transport Corporation is primarily constituted to provide an efficient, adequate, economical and properly co-ordinated system of road transport service, and therefore, could not be held to be a dealer carrying on business in old and scrapped materials and that therefore the charging section which only makes a dealer liable to pay tax in respect of the turnover for the year cannot be taken to include the Road Transport Corporation which is a statutory body constituted for a special purpose.

9. We are, therefore, of the view that the decision in *State of Tamil Nadu* v. *Burmah Shell Company Limited*[3] which is strongly relied on by the Revenue cannot be of any help for the reason that the sales of unclaimed and unserviceable goods effected by the Port Trust are not incidental or ancillary to any business, but are only in the course of its performance of the statutory duties.

1. (1972) 29 S.T.C. 266.
2. (1971) 27 S.T.C. 42.
3. (1973) 31 S.T.C. 426: (1973) 1 S.C.W.R. 720: (1973) Tax.L.R. 1739 : A.I.R. 1973 S.C. 1045.

10. The learned Government Pleader seeks to bring the Port Trust withim *Eplanation* (2) to section 2 (*g*) of the Act. The said *Explanation* is as follows :—

> "The Central Government or any State Government which, whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash, or for deferred payment or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purpose of this Act."

According to the Revenue the Port Trust is a department of the Central Government and, therefore, even if the sales effected by it are not in the course of business, they are liable to be taxed, as the *Explanation* deems a department of Central Government or a State Government a dealer for the purpose of this Act. But we are not able to accept this contention of the Revenue. The Port Trust is a statutory body constituted by the Madras Port Trust Act, 1905 and though it is subject to certain control by the Central Government under the provisions of that Act, it cannot be said to be a department of the Central Government. Therefore, the said *Explanation* cannot be availed of by the Revenue.

11. The learned Government Pleader, then seeks to bring in the Port Trust under the term "local authority" occurring in section 2 (*g*) (i) of the Act. But even if the Port Trust is taken to be a local authority, still it cannot be treated as a dealer unless it carries on the business of buying and selling etc. As we have already held that the Port Trust, a statutory body, has not effected the sales in question in the course of any business activity, this contention also has to be rejected.

12. As a matter of fact in *Trustees of the Port of Madras* v. *State of Madras*[1], the question arose as to whether the Madras Port Trust could be taxed under the Act on their supply of water to the ships which touched the Port of Madras. A Division Bench of this Court held that the Port Trust in supplying water to the ships and collecting a fee therefor was only discharging a duty imposed upon it by the Madras Port Trust Act, 1905 and was not doing any business so as to make it a dealer within the meaning of section 2 (*g*) of the Act. We therefore hold that the Port Trust was not a dealer when it effected the sales in question and, therefore, the sales are not taxable under the Act.

12. In this view the Tax Cases are dismissed with costs. Counsel's fee Rs. 150 in T.C. No. 35 of 1970 alone. There will be no order as to costs in T.C. No. 36 of 1970.

P.S.P. *Tax case dismissed.*

1. (1960) 11 S.T.C. 224 : I.L.R. (1960) Mad. 529: (1960) 2 M.L.J. 86: (1960) Mad. L.W. 198.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

Kalyani Ammal .. *Petitioner* *

v.

The Official Receiver of North Arcot, having his Office at Fort, Vellors and another .. *Respondents*

Provincial Insolvency Act (V of 1920), sections 4, 53 and 75—Alienation by insolvent —Application by Official Receiver under section 53—Alienation found to be sham and nominal —Impact of section 4—Application if maintainable.

Under section 53 of the Provincial Insolvency Act the application to set aside a transfer of property by the insolvent has to be made within two years of the presentation of the insolvency petition. The Official Receiver cannot take the risk of not filing an application before the insolvency Court to avoid the transaction. If the Court ultimately finds that the transaction is really a sham and nominal one, then there is no need to set aside the transfer for the simple reason that there was no transfer at all under the transaction it being a sham and nominal or a fictitious one. If it is sham and

* C.R.P. Nos. 2446 and 3142 of 1973.
21st March, 1974.

nominal or fictitious, the transaction is void *ab initio*. But it is for the Court to decide whether it is a sham and nominal transaction or whether it is a fraudulent transfer. [*Para.* 6.]

Section 75 of the Act contemplates an application to be filed under section 4. The second proviso to section 75(1) speaks of decision of a Subordinate Court under section 4. Under that proviso, an aggrieved person is entitled to file an appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure against the decision of the District Court on appeal from a decision of a Subordinate Court under section 4 of the Insolvency Act. With regard to matters not falling under section 4, there is no second appeal but under the first proviso to section 75 (1), the Court has jurisdiction to call for the records and interfere if an order made in any appeal decided by the District Court was not according to law. [*Para.* 4]

Cases referred to :—

Padamsi Premchand v. *Laxman Vishnu*, I.L.R. (1949) Bom. 129 : 51 Bom.L.R. 28 : A.I.R. 1949 Bom. 129 (F.B.) ; *Gulab Chand* v. *Lachuman Sah*, A.I.R. 1955 Pat. 413 ; *Saraswathi* v. *Krishnier*, (1965) 1 M.L.J. 128 : I.L.R. (1964) 2 Mad. 592 : 77 L.W. 379 : A.I.R. 1964 Mad. 501 ; *Paramatmuni Hanumantha Rao* v. *Official Receiver*, (1970) 2 An.W.R. 69 : A.I.R. 1970 Andh. Pra. 38: *Hans Raj* v. *Rattan Chand*, (1968) 1 S.C.J. 468 : (1967) 3 S.C.R. 365: A.I.R. 1967 S.C. 1780.

Petition under section 75 (1) of Act V of 1920 praying the High Court to revise the order of the District Court, North Arcot at Vellore, dated 5th September, 1973 and made in C.M.A. No. 109 of 1972 and I.A. No. 317 of 1973 in C.M.A. No. 109 of 1972 respectively in (I.A. No. 68 of 1970, I.P. No. 11 of 1968, Sub-Court, Vellore).

V. Ratnam, for Petitioner.

O. Radhakrishnan, for Respondents.

The Court made the following

ORDER.—These two revision petitions are filed by the second respondent in I.A. No. 68 of 1970 in Insolvency Petition No. 11 of 1968 on the file of the Court of the Subordinate Judge, Vellore. The first respondent to that application was adjudged insolvent in I.P. No. 11 of 1968 on 6th April, 1970. The Official Receiver, in whom the insolvent's properties came to be vested, filed I.A. No. 68 of 1970 for setting aside two alienations made by the insolvent, under section 53 of the Provincial Insolvency Act, hereinafter referred to as the Act, one in favour of the second respondent therein and the other in favour of the third respondent therein. The first respondent to the application is the insolvent. Both those alienations were within two years prior to the presentation of the insolvency petition. The Insolvency Court (Subordinate Judge's Court, Vellore) allowed the said application in respect of both the alienations. The third respondent to the application did not file any appeal. Only the second respondent to the said application filed C.M.A. No. 109 of 1972 on the file of the District Judge of North Arcot at Vellore. He also filed I.A. No. 317 of 1973, in the said civil miscellaneous appeal for reception of certain documents as additional evidence. The appellate Judge dismissed the civil miscellaneous appeal as well as the said application for reception of additional evidence. Hence the second respondent in the application under section 53 of the Act, has filed the present two revision petitions, one against the dismissal of her civil miscellaneous appeal and the other against the dismissal of the application for reception of additional evidence. These two revisions are under the proviso to section 75 of the Act.

2. The point taken by Mr. V. Ratnam, the learned Counsel for the revision petitioner second respondent in I.A. No. 68 of 1970 on the file of the Insolvency Court is that on the finding of the Insolvency Court and that of the appellate Judge who heard the civil miscellaneous appeal, I.A. No. 68 of 1970 is not maintainable. It is pointed out that the Courts below have held that the alienation which is a sale dated 2nd August, 1968 in favour of the revision petitioner is a sham and nominal one, and that being so, there is no transfer of property as contemplated under section 53 and that therefore the question of setting aside the transfer as one being in

fraud of creditors does not arise. The learned Counsel is right in his contention that when a transaction is declared as sham and nominal there is no transfer of property under the transaction, and that therefore there is no need to set aside the same, and section 53 of the Act would not apply. However, the question is whether the application filed by the Official Receiver should not have been entertained by the insolvency Court. Under section 4 of the Act it is provided that the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever and sub-section (2) thereof provides that such decision of the Court shall be final and binding for all purposes as between the debtor and the debtor's estate on the one hand and all claimants against him on the other. However, the section makes it clear that the power of the Court to decide the questions mentioned therein is subject to the other provisions of the Act. The question whether a sale deed executed by the insolvent is sham and nominal is certainly a matter which would be covered by section 4. In fact such a position is not disputed by the learned Counsel for the revision petitioner. However, the contention is that there is no provision in the Act for the Official Receiver to file an application to the Insolvency Court for declaring a sale transaction to be a sham and nominal one, that section 4 itself does not contemplate the filing of an application by either the Official Receiver or any other person, that the said section only defines the Iurisdiction of the Court and that, therefore, the Insolvency Court is not entitled to give a decision regarding the sham and nominal nature of the transaction on an application which was purported to be under section 53 of the Act. As noticed earlier, the Official Receiver filed the application under section 53 contending that the transfer in question is in fraud of creditors. But in the said application there are also averments that the transaction is a sham and nominal one. Of course, the two averments, namely that the sale is a transfer in fraud of creditors and that the sale is only a sham and nominal one cannot stand together. Though the Official Receiver has pleaded both the grounds, the Insolvency Court and the appellate Judge have held that the sale is not a real sale and that the same is a sham and nominal one. The question is whether under an application which purported to be under section 53 of the Act, the Courts below are entitled to decide that the transaction is a sham and nominal one.

3. *Padamsi Premchand* v. *Laxman Vishnu*[1] is a case where the transfers were more than two years prior to the presentation of the insolvency petition. The Official Receiver filed an application to the Insolvency Court contending that the said transfers were sham and nominal and fictitious. The Full Bench of the Bombay High Court held that the Insolvency Court had jurisdiction under section 4 to decide whether the transactions were nominal and fictitious. It was pointed out in that case that if a transaction falls within the ambit of section 53, then it can be challenged only if the conditions laid down in the section are satisfied and that it would then be not open to the Receiver to say that though the transaction falls under section 53 and he could not challenge it under that section (because he could not satisfy the conditions) he would fall back upon section 4 and invoke the wider jurisdiction conferred by that section. But the Full Bench further held that if the transaction is fictitious or nominal, it does not fall within the ambit of section 53 and that then section 4 is wide enough to confer upon the Insolvency Court jurisdiction to decide whether these transactions are in fact nominal or fictitious. In *Gulab Chand* v. *Lachuman Sah*[2], a Division Bench has taken the view that the Insolvency Court has jurisdiction to entertain an application under section 4 filed by a third party. *Saraswathi* v. *Krishnier*[3] also proceeds on the footing that an application under section 4 is maintainable. *Paramatmuni Hanumantha Rao* v. *Official Receiver*[4], is also to the same effect.

4. A perusal of section 75 of the Act goes to show that the Act contemplates an application to be filed under section 4 of the Act. The second proviso to section

1. I.L.R. (1949) Bom. 129: 51 Bom. L.R. 28: A.I.R. 1949 Bom. 129 (F.B.).
2. A.I.R. 1955 Pat. 413.
3. (1965) 1 M.L.J. 128: I.L.R. (1964) 2 Mad. 592: 77 L.W. 379: A.I.R. 1964 Mad. 501.
4. (1970) 2 An.W.R. 69: A.I.R. 1970 A.P. 38.

75 (1) of the Act speaks of decision of a Subordinate Court under section 4 of the Act. Under that proviso, an aggrieved person is entitled to file an appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908 against the decision of the District Court on appeal from a decision of a Subordinate Court under section 4 of the Act. With regard to matters not falling under section 4, there is no second appeal (as in the case of the second proviso), but under the first proviso to section 75 (1), the Court has jurisdiction to call for the records and interfere if an order made in any appeal decided by the District Court was not according to law.

5. However, Mr. Ratnam, the learned Counsel for the revision petitioner contends that in *Hans Raj* v. *Rattan Chand*[1], it has been held that no application under section 4 can be filed either by the Official Receiver or by any other party. But a perusal of that judgment would show that it does not decide that under no circumstances an application under section 4 can be filed. That was a case where the Official Receiver proceeded against certain property and took possession of the same, treating it as that of the insolvent. The appellant before the Supreme Court claimed that the property was his and not that of the insolvent. It is obvious under those circumstances that his remedy against the act of the Receiver in taking possession, is to file an application to the Insolvency Court under section 68 of the Act. Under the proviso to the said section, such an application has to be filed within 21 days from the date of the Act or decision complained of. The appellant before the Supreme Court did not file his application before the Insolvency Court within the said period of 21 days. The contention raised on behalf of the appellant was that his application should be treated as one under section 4 of the Act. Their Lordships of the Supreme Court held that the appellant cannot be allowed to get over the period of limitation fixed under section 68 by claiming that the application was one under section 4. Therefore, the observations made in that judgment have to be understood in the light of the facts of that case. It has been pointed out that as section 4 says that the powers of the Court defined thereunder are subject to the other provisions in the Act, the application which squarely fell under section 68 ought to have been filed within 21 days of the act complained of. Their Lordships finally concluded that the application being one under section 68, the same was incompetent on the ground of limitation after the lapse of 21 days from the relevant date.

6. The learned Counsel for the revision petitioner contends that if according to the Official Receiver, the transaction is a sham and nominal one, he could have simply proceeded against the property treating the same as that of the insolvent allowing the aggrieved party (the revision petitioner herein) to move the Insolvency Court under section 68 of the Act. It is contended that in this case only on such an application under section 68, the jurisdiction of the Insolvency Court to decide the question whether the transaction is sham and nominal or not (conferred by section 4) can be invoked. However, I am unable to agree with this contention. There may be cases where the Official Receiver is not sure whether the transaction amounted to a fraudulent transfer or whether it is only a sham and nominal one. Supposing he proceeds against the property treating the transaction as a sham and nominal one and it ultimately turns out to be a fraudulent transfer coming within the purview of section 53, then there is the possibility of the remedy of the Official Receiver being barred by limitation. Under section 53, the application to set aside a transfer has to be made within two years of the presentation of the insolvency petition. Therefore, the Official Receiver cannot take the risk of not filing an application before the Insolvency Court to avoid the transaction. If the Court ultimately finds that the transaction is really a sham and nominal one, then there is no need to set aside the transfer for the simple reason that there was no transfer at all under the transaction, it being a sham and nominal or a fictitious one. If it is sham and nominal or fictitious, the

1. (1968) 1 S.C.J. 468 : (1967) 3 S.C.R. 365 : A.I.R. 1967 S.C. 1780.

ransaction is void *ab initio*. But it is for the Court to decide whether it is a sham and nominal transaction or whether it is a fraudulent transfer.

7. Under these circumstances, I see no merit in the contention raised by the learned Counsel. No point was raised in C.R.P. No. 3142 of 1973 which is against the order of the District Court dismissing the application for receiving certain documents as additional evidence.

8. Both the revision petitions fail and they are accordingly dismissed. However, there will be no order as to costs. But the Official Receiver can take the cost from the estate. Counsel's fee Rs. 100.

R. S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

Pavadai Padayachi .. *Appellant**

v.

Pichammal .. *Respondent.*

Tamil Nadu Cultivating Tenants Arrears of Rent Control Act (XXI of 1972)—*Cultivating tenant—Usufructuary mortgage—Lease-back arrangement—Tenant in arrears of rent—Tenant owner of land—Whether entitled to relief under Tamil Nadu Act XXI of* 1972.

A person executed a usufructuary mortgage of his land in favour of another. There was a lease-back arrangement between the parties. The usufructuary mortgagee obtained decrees for arrears of rent in three different suits and these decrees were sought to be executed. The mortgagor-lessee claimed that he was entitled to relief under Tamil Nadu Act XXI of 1972.

Held : The term "belonging" in the expression belonging to another in the definition of "cultivating tenant" is not synonymous with ownership. Even possession of an interest less than that of full ownership could be signified by that word. [*Para.* 2.]

The mortgagor-lessee will, therefore, be entitled to relief as a "cultivating tenant."

Case referred to:—

Mohammed Amir v. *Municipal Board of Sitapur*, (1966) 1 S.C.J. 484: A.I.R. 1965 S.C. 1923.

Appeal against the order of the Court of the First Additional Subordinate Judge, Cuddalore, dated 30th August, 1973 and made in C.M.A. No. 142 of 1973. (E.P. No. 864 of 1972 in O.S No. 1341 of 1970, District Munsif Court, Cuddalore).

C.R.P. Nos. 2786 *and* 2807 *of* 1973.—Petitions under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the First Additional Subordinate Judge, Cuddalore, dated 30th August, 1973 and made in C.M.A. No. 131 of 1973 and 132 of 1973 respectively (E.P. Nos. 1480 of 1972 and 1718 of 1972 respectively in O.S. Nos. 1066 of 1972 and 351 of 1972 respectively, District Munsif Court, Cuddalore).

S. Thiagaraja Ayyar, for Appellant.

P. S. Ramachandran, for Respondent.

The Court delivered the following

JUDGMENT.—The respondent herein has obtained decrees for arrears of rent in three different suits and those decrees are sought to be executed. The tenant, who is the appellant in the C. M. S. A. and petitioner in the two revision petitions (hereinafter referred as the revision petitioner), filed counter statement contending that he is entitled to the relief under Tamil Nadu Act XXI of 1972. The Court below has held that the revision petitioner is not entitled to the relief, on the ground that, the land cultivated by him being his own, he is not a cultivating tenant. The fact is that the revision petitioner had executed a usufructuary mortgage in respect of the land in favour of the respondent and there is a lease-back arrangement between the parties. It is under that arrangement the revision petitioner has been cultivating the land for a fixed rent. The question is whether there is no relationship of landlord and tenant between the respondent and the revision petitioner. Admittedly under the lease-back arran-

* A.A.O. No. 181 of 1973 and C.R.P. Nos. 2786 and 2807 of 1973. 1st April, 1974.

gement, the respondent is entitled to get rent for the land from the revision petitioner and there is really no dispute that the relationship of landlord and tenant between the respondent and the revision-petitioner does exist. However, the learned Counsel for the respondent contends that the definition of the term 'cultivating tenant' in Act XXV of 1955 as amended in Act IX of 1969 would show that the land cultivated by the tenant should be owned by another person. The contention is that, the revision petitioner not having transferred all his rights in the land to the respondent and he being still the owner of the equity of redemption, it cannot be said that he is cultivating the land of another person. Under the definition of the word 'cultivating tenant' it is stated that the person must contribute his own physical labour or that of any member of his family in the cultivation of any land belonging to another. The learned Counsel for the respondent wants to equate the term 'belonging to another' in respect of the land with ownership, of the same. However, I am unable to agree with this contention.

2. The revision petitioner was no doubt the full owner of the land. Out of the bundle of rights which he had, he has already transferred all the rights, except the right to the equity of redemption, in favour of the respondent. The respondent, in his capacity as usufructuary mortgagee, is entitled to enter into a lease-back arrangement with the revision petitioner and it is under that arrangement the revision petitioner is bound to pay the rent. There is nothing to show that the word 'belonging' is synonymous with ownership. As a matter of fact, in *Mohammed Amir* v. *Municipal Board of Sitapur*[1], their Lordships of Supreme Court have pointed out that, though the word 'belonging' is capable of denoting an absolute title, it is nevertheless not confined to connoting that sense. Even possession of an interest less than that of full ownership could be signified by that word. Under the circumstances, the civil revision petitions and the appeal are allowed. There will be no order as to costs.

S.J. — *Petitions and Appeal allowed.*

1. (1966) 1 S.C.J. 484 : A.I.R. 1965 S.C. 1923 at 1925.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Gopalakrishna Pillai and another .. *Appellants**

v.

Maruthappan *alias* **Susintharan and others** .. *Respondents.*

Hindu Law—Joint family—Suit for partition and possession—Alienation by father—Whether for family necessity and antecedent debts—Burden of proof and nature thereof.

The nature of proof that an alienee of Hindu joint family property has to give in respect of debts incurred by a father of minors is limited in character and if the Courts were satisfied that the alienees had made sufficient enquiry as regards the existence of family necessity it could be construed that the burden had been discharged by the alienees. In the same way if the alienees were able to establish that there were antecedent debts, the application of the money borrowed for the same need not be proved by the alienees. [*Para.* 8.]

Cases referred to :—

Hanuman Prasad's case, (1854-57) 6 M.I.A. 393, 424; *Meenakshi Achi* v. *Manickam Chettiar*, (1960) 1 M.L.J. 89 : I.L.R. (1959) Mad. 1046 : A.I.R. 1960 Mad. 99.

Appeals against the Decree of the Court of the Principal Subordinate Judge, Tirunelveli, in Appeal Suit No. 194 of 1968, preferred against the Decree of the Court of the District Munsif of Tenkasi in Original Suit No. 408 of 1966.

K. Venkataswami, P. Venkataraman and *K. Govindarajan*, for Appellant.

P. Ramaswami, for Respondent.

The Court delivered the following

JUDGMENT.—The 7th and 9th defendants are the appellants in Second Appeal No.

* S.A. Nos. 360, 389, 1196 and 1363 of 1971. *26th April*, 1974.

360 of 1971. It concerns with item 4 of the suit properties. The 8th and 20th defendants are the appellants in Second Appeal No. 389 of 1971 and it concerns with items 2, 3 and 7 of the suit properties. Defendants 26 and 31 are the appellants in Second Appeal No. 1363 of 1971 and it concerns with items 13, 14 and 18 of the suit properties. The suit is for partition and possession of the plaintiff's 1/5th share of the suit properties and for recovery of future mesne profits from defendants 7 to 31. The plaint allegations are that the suit properties are the properties of the joint family consisting of the first defendant and his sons who are the plaintiff and defendants 2 to 4. They are entitled to a one-fifth share each. The fifth defendant is the daughter and the sixth defendant is the wife of the first defendant. The sixth defendant has got a right of maintenance and fifth defendant has got a right of maintenance till her marriage. The first defendant and his brothers partitioned the properties by two partition deeds. The suit properties and other properties fell to the share of the first defendant. The income from the properties and other properties per year was two hundred kottahs of paddy, ten kottahs of gingelly, ten kottahs of cholam, one kottah of blackgram and ten pothis of cotton worth Rs. 2,000. There was no debt to the family. A huge amount could be saved from the income from the properties. But the first defendant was leading an immoral life. He was taking liquor and having illicit connection with other women. He was a gambler. His sons were minors. He has alienated the properties fraudulently without any family necessity. He has executed benami sale deeds. They are not supported by consideration. The plaintiff and defendants 2 to 4 were not benefited by the said transactions. They are not binding on the plaintiff and defendants 2 to 4.

2. The first defendant remained *ex parte*. The 22nd defendant was exonerated. In the written statement filed by defendants 2 to 6 they contended that the plaint allegations are true and that they have paid Court-fee for partition of their shares. The alienations according to these defendants made by the first defendant are not binding on defendants 2 to 4. A sum of Rs. 8,000 is required towards the marriage of the 5th defendant. The sixth defendant is entitled to maintenance and a sum of Rs. 100 each per month is required towards maintenance of each person. 3/5th share of defendants 2 to 4 may be partitioned and a charge may be created with regard to the marriage of the 5th defendant and the maintenance of defendants 5 and 6.

3. As regards the alienees who are from defendants 7 onwards, they *inter alia* contended that the sales effected and the debts incurred by the first defendant who is no other than the father of the plaintiff and defendants 2 to 5 are for family necessities and to discharge antecedent debts, that the minors were benefited by such transactions and that the sales effected and debts incurred by the first defendant were not for illegal or immoral purposes.

4. The trial Court, after elaborately discussing the evidence on record came to the conclusion that the first defendant was not having any immoral connections with other women as alleged by the plaintiff or incurred the debts for illegal purposes. As regards, the binding nature of the debts, the trial Court came to the conclusion that the debts incurred by the father of the plaintiff are binding upon his minor sons.

5. Aggrieved by the decision of the trial Court, the plaintiff preferred an appeal to the Sub-Court, Tirunelveli. The Subordinate Judge, Tirunelveli came to the conclusion that the alienees have not discharged their burden of proving that the sales effected and the debts incurred by the first defendant were for family necessity and also to discharge the antecedent debts. With these observations the lower appellate Court allowed the appeal and thereby granted a decree for partition as prayed for by the plaintiff. Aggrieved by the decision of the lower appellate Court, various defendants who are the alienees from the first defendant in the suit have filed independent appeals as stated above.

6. Mr. K. Venkataswami, the learned Counsel appearing for the appellants, in S. A. No. 360 of 1971 submitted that the lower appellate Court has not properly understood the principle evolved by various decisions as regards the burden of proving the legal necessity and the antecedent debts for the sales effected by the father of the minors in respect of the joint family properties. The learned Counsel further submitted that there is absolutely no finding by the lower appellate Court as regards the allegation by the plaintiff to the effect that the first defendant was addicted to illegal ways and immoral life. The learned Counsel further submitted that the lower appellate Court has not adverted to the evidence given by the plaintiff as P. W. 1 which, coupled with the evidence of the defendants will prove that the family had legal necessities to borrow and to sell certain properties. The said argument advanced by Mr. Venkataswami was more or less adopted by the learned Counsel appearing for the appellants in S. A. Nos. 389 of 1971 and 1196 and 1363 of 1971. Mr. T. R. Srinivasan, learned Counsel appearing for the appellants in S. A. No 1363 of 1971 pointed out the reasoning of the lower appellate Court as regards item No. 18 and submitted that the duty of the alienees is only to prove that some antecedent debts existed but they cannot go further and establish the actual application of the money borrowed or taken by the first defendant. As far as item 18 is concerned, Mr. T.R. Srinivasasn submitted that they have proved that the said sale is for discharging prior mortgage-debt apart from the family necessity as mentioned in the sale deed for item No. 18. When it is so, the lower appellate Court has completely gone wrong in coming to the conclusion that the proof required as per law has not been given by the 31st defendant to establish that the sale effected under Exhibit B-139 is for discharging antecedent debts. Mr. Ganesan, the learned Counsel appearing on behalf of Mr. Desappan appearing for the appellant in S. A. No. 389 of 1971 submitted that the evidence let in by the 8th and 20th defendants is sufficient to discharge their burden as regards the genuineness of the sale effected in their favour in respect of items 2 and 3 and 7 of the suit properties. The learned Counsel appearing for the appellants in S. A. No. 1196 of 1971 adopted the arguments advanced by the Counsel for the appellants in the other second appeals.

7. Mr. Venkateswara Rao, learned Counsel appearing for the plaintiff-respondent submitted that there is absolutely no need for the first defendant to dispose of almost all the properties as the family had enough properties and had also large and sufficient income to manage the family. It is further submitted by the learned Counsel that the lower appellate Court has considered each of the items and has come to the conclusion that the sales effected by the first defendant are neither for family necessity or to discharge antecedent debts.

8. I have been taken through the judgments of the Courts below and also the evidence on record. From the decision in *Hanuman Prasad's case*[1], it is seen that up till now it is well settled that the burden is upon the alienee in respect of the alienations effected by the father of the minors to prove initially that the sale is for discharging antecedent debts or for family necessit es. If this initial burden is discharged, it is for the minors to establish that the debts incurred or the sales effected by the father are for illegal or immoral purposes. Thus, it is clear that the alienees must prove the antecedent debts or they ought to have enquired as regards the legal necessity for effecting the sales of the properties in which the minors have interest. No doubt it is too much to expect from the al'enees to find out whether the monies have been actually applied by the father of the minors for such purposes. It is for the Court to ultimately decide from the evidence on record as to whether the alienees have discharged their burden initially in respect of such transactions and borrowings. It is also well settled by various decisions that while all the evidence is before the Court the burden of proof assumes little importance. But from the evidence on record it is for the Court to come to the conclusion whether the

1. (1854-57) 6 M.I.A. 393, 424.

alienees have discharged their initial burden as laid down in the various decisions of our High Court and also of the Supreme Court. It is useful to refer to the decision in *Meenakshi Achi* v. *Manickam Chettiar*[1], wherein it has been stated correctly that :

> "An alienee making a *bona fide* enquiry as to the existence of the antecedent debt for the discharge of which the monies were borrowed, ostensibly by a father would be protected, notwithstanding the fact that the monies borrowed were not proved to have been actually utilised for the discharge of the entire debt. Where the father mortgaged the joint family property in order to discharge his antecedent debt not tainted with illegality or immorality the son's interest in the property would be liable for the amount borrowed."

It has also been further made clear in that decision that the initial burden is upon an alienee to prove that the alienations or borrowings by the father of the minor were to discharge the antecedent debts or for legal necessity. Bearing in mind the abovesaid principles, I am of the view that the lower appellate Court has not properly discussed the evidence on record including that of the plaintiff as P. W. 1. It has not also adverted to the allegation made by the plaintiff as regards the character of the first defendant. The nature of proof that the alienee has to give in respect of the debts incurred by the father of the minors is limited in character and if the Court is satisfied that the alienees had made sufficient enquiry as regards the family necessity it can be construed that the burden has been discharged by the alienees. In the same way if the alienees are able to establish that there were antecedent debts, the application of the money borrowed for the same need not be proved by the alienees. The lower appellate Court, in my opinion, has to discuss in detail all the available evidence on record and come to the conclusion bearing in mind the principles laid down in the various decisions and also discussed by me in this judgment.

1. (1960) 1 M.L.J. 89: I.L.R. (1959) Mad. 1046: A.I.R. 1960 Mad. 99.

9. In these circumstances, the second appeals are allowed, the decree and judgment of the lower appellate Court are set aside and the case remanded to the file of the lower appellate Court for the purpose of disposing of the same afresh bearing in mind the observations made by me in the paragraphs *supra*. The Court-fee paid on the memorandum of grounds in the above second appeals will be refunded to the respective appellants. There will be no order as to costs. No leave.

S. J. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

M. Palaniappa Pillai .. *Petitioner**

v.

M. M. Pambana Gounder and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 52—*Money in custody of Munsif's Court to credit of a suit—Decree-holder in Subordinate Judge's Court attaching amount—Application to send for amount—Two other decree-holders in Munsif's Court who had attached opposing—Proper order to be passed.*

A certain sum of money was in the custody of a District Munsif's Court to the credit of a particular suit. The first respondent who had obtained a decree against the same judgment-debtors in the Court of the Subordinate Judge of the same place had attached the amount and filed an application for the sending of the amount to the Subordinate Judge's Court. Two other persons who had obtained decrees against the same judgment-debtors in the District Munsif's Court and had also attached the amount opposed the application. The Subordinate Judge however allowed the application. On a revision against the order.

Held, The provisions of Order 21, rule 52, proviso 1, Civil Procedure Code will apply and it is only after the priority amongst the

* C.R.P. No. 2015 of 1973. *19th April,* 1974.

three rival claimants had been settled by the District Munsif and in case the first respondent was entitled to priority, the Subordinate Judge can send for the amount and not otherwise.

[*Paras.* 2 *and* 3.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Additional Subordinate Judge, Erode, dated 8th August, 1973 and made in E. A. No. 421 of 1972 in E. P. No. 72 of 1972 in O. S. No. 261 of 1969.

Sivamani, for Petitioner.

Gandhi, for Respondent.

The Court made the following

ORDER.—The sixth respondent before the Court below is the revision petitioner before me. The only point that arose for determination by the Court below is whether it can send for the amount of Rs. 3,984-80 P. which is in the custody of the Court of the District Munsif, Erode to the credit of O. S. No. 111 of 1969. The first Respondent herein, as decree-holder in O. S. No. 261 of 1969 on the file of the Court below (the Court of the Subordinate Judge, Erode, filed an execution petition, got the abovesaid amount attached and then filed E. A. No. 421 of 1972 for sending for that amount. This application was opposed by two other decree-holders against the same judgment-debtors. The judgment-debtors were arrayed as Respondents 1 to 4 before the Court below and the two other decree-holders were arrayed as Respondents 5 and 6 respectively in the abovesaid application, *viz.*, E. A. No. 421 of 1972. The other two decree-holders have obtained decrees in the Court of the District Munsif, Erode against the same judgment-debtors and they had also attached the abovesaid amount, *viz.*, Rs. 3,984-80 P. which is in the custody of the Court of the District Munsif. The Court below (the learned Subordinate Judge, Erode), thinking that section 63 of the Code of Civil Procedure is attracted to the facts of this case, has ordered the application for sending for the amount.

2. The learned Subordinate Judge has not realised that that section applies only when the property attached is not in the custody of a Court. Only in cases where the property attached is not in the custody of Court, the question of the Court of higher grade having precedence over a Court of the lower grade in determining any claim regarding the property so attached would arise. But, here, we are concerned with money that is in the custody of a Court. The relevant provision that has to the looked into is Order 21, rule 52, Civil Procedure Code. The main part of the said Rule, no doubt, says that the custody Court should hold the property subject to the further orders of the attaching Court. But, there is the proviso (Proviso No. 1) which is the following terms :

> " Provided that where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise shall be determined by such Court."

The first Respondent before me (the petitioner in E. A. No. 421 of 1972) is the decree-holder referred to in the abovesaid proviso. Respondent's 5 and 6 before the Court below are persons claiming to be interested in the amount now in the custody of the District Munsif, Erode. The question of priority among these three rival claimants is to be determined, undoubtedly, only by the custody Court, for the abovesaid proviso says that the question of priority or title has to be determined only by the Court which has custody of the property attached. The learned Subordinate Judge has misdirected himself in thinking that section 63 of the Civil Procedure Code is attracted to the facts of this case and ordered sending for the amount on the ground that his Court is of superior grade than the Court which has custody of the money.

3. The question of rateable distribution does not arise at all at present. It is not necessary to consider, in the present civil revision petition, whether the conditions prescribed under section 73 of the Civil Procedure Code are

available in this case and if so, whether the three claimants are entitled to rateable distribution. The only point, as I said, is whether the learned Subordinate Judge, Erode has jurisdiction to send for the amount which is now in the custody of the Court of the District Munsif, Erode, at this stage. Though the District Munsif has to hold the amount subject to the further orders of the attaching Court, in this case, the learned Subordinate Judge, Erode, Proviso No. 1 to rule 52 of Order 21 would apply and it is the District Munsif, Erode, who has to decide the question of priority amongst the three rival claimants. Only after the District Munsif so decides the priority and in case the first Respondent herein is entitled to priority, the Court below can order send for the amount, and not otherwise. Under such circumstances, on the execution application filed by the first respondent herein, the proper order that the lower Court ought to pass is giving a direction to the Court of the District Munsif, Erode to determine the question of priority claimed by the three rival claimants. Accordingly, the civil revision petition is allowed and the matter is remitted back to the Court below for giving suitable directions in the light of the observations above. There would be no order to as costs.

P.S.P. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ramaswami, J.*

Janakiammal .. *Appellant**

v.

Rathinam Asari and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 34, *rule* 10 *and section* 35—*Suit for redemption—Payment of costs—Right of mortgagee and mortgagor.*

In a suit for redemption or in a suit for enforcement of a mortgage, what the Court will have to consider is whether the mortgagee by his conduct has disentitled himself to the costs of the suit. If there were no circumstances or misconduct, disentitling the mortgagee from claiming the costs, the Court would have no option but to give him the costs of the suit and to include that amount in the amount due under the mortgage. Only in cases where the Court finds that the mortgagee is disentitled to the costs, it will have to go into the further question, whether it could use its discretion in awarding costs to the mortgagor. [*Para.* 7]

Hence, in the matter of costs in a suit for redemption, the only thing that is relevant for the Court to consider is whether the mortgagee by his conduct disentitled himself from claiming the costs.

[*Para.* 8.]

Cases referred to :—

Chidambaram Chettiar v. *Ramaswami Chettiar*, (1939) 1 M.L.J. 687 : 49 L.W. 525 : A.I.R. 1939 Mad. 654 ; *Minakshi Ayyar* v. *Achalier*, (1942) 2 M.L.J. 124 : I.L.R. (1943) Mad. 205 : A.I.R. 1942 Mad. 592 ; *Dawoodbhai* v. *Shaikhali*, A.I.R 1953 Bom. 445.

Appeal against the decree of the District Court (Additional Judge) Madurai in Appeal Suit No. 199 of 1969, preferred against the decree of the Court of the Principal Subordinate Judge of Madurai in Original Suit No. 229 of 1967.

A. Varadarajan, for Appellant.

S. Gopalaratnam and *P. N. Venugopalan*, for Respondents.

The Court delivered the following

JUDGMENT.—The third defendant is the appellant. O.S. No. 229 of 1967, out of which this second appeal arises, is a suit for redemption of a usufructuary mortgage dated 9th March, 1955, executed by one Santhanathammal in favour of the fourth defendant in the suit. The plaintiffs are the legal representatives of the mortgagor. The fourth defendant assigned his rights under the mortgage in favour of one Mahalingam, the husband of the first defendant. The second defendant in the suit is the power of attorney agent of the said Mahalingam. Subsequently by a deed, dated 23rd January, 1967, registered on 18th February, 1967, the first defendant and the second defendant,

* S. A. No. 1280 of 1971. 15th February, 1974.

as the power of attorney agent of the first defendant's husband, assigned the mortgage rights to the third defendant. In the meanwhile, on 7th February, 1967, the plaintiffs herein filed O.P. No. 28 of 1967, on the file of the Subordinate Judge's Court, Madurai, under section 83 of the Transfer of Property Act and deposited a sum of Rs. 7,000 on 16th February, 1967 to the credit of the said original petition. In that petition, the first, second and fourth defendants alone were made parties and the third defendant was not made a party. The first and second defendants refused to receive the mortgage money and filed a counter stating that they had assigned their right to the third defendant and that without impleading her as a party in that petition, no orders could be passed in that petition. Neither the plaintiffs impleaded the third defendant in the original petition, nor the third defendant got herself impleaded and therefore that petition was dismissed. Thereafter, the plaintiffs filed the present suit for redemption.

2. There was no dispute that the plaintiffs were entitled to redeem. But the defendants contested the suit in regard to the costs of the suit, the mesne profits payable by them and in regard to a sum of Rs. 302.23, which they claimed as being due to the third defendant in addition to the amount of Rs. 7,000 deposited. In regard to the costs, the third defendant contended that, since there was no tender made to her, though the suit was filed subsequent to the assignment, she was entitled to the costs of the suit. So far as mesne profits were concerned, it was the case of the third defendant that, since the amount of Rs. 7,000 in deposit did not represent the full amount due under the mortgage, she was not liable to pay mesne profits. In any case, her liability to mesne profits could not be extended prior to the date of the filing of the suit.

3. The sum of Rs. 302.23 represents two items and the interest thereon. The first item is a sum of Rs. 90 which was paid by the first and second defendants to the first plaintiff for the purpose of enabling him to pay the municipal tax in respect of the mortgaged property. The second item is a sum of Rs. 70.23 representing the amount paid by the first and second defendants towards one half of the municipal taxes payable by the plaintiffs. With interest at 12 per cent. on these amounts, the total amount claimed came to Rs. 302.23. The case of the plaintiffs was that since they had tendered a sum of Rs. 7,000 on 16th February, 1967, itself by deposit of the money into Court even prior to the registration of the assignment deed in favour of the third defendant on 18th February, 1967, there was no need for any separate tender in favour of the third defendant and that therefore the third defendant was not entitled to claim the costs of the suit, but that they were entitled to be paid their costs of the suit. So far as mesne profits were concerned, their case was that since they had deposited the entire sum of Rs.7,000 as early as 16th February, 1967, they were entitled to mesne profits from the date of deposit. In regard to the sum of Rs. 302.23, they contended that that was an independent transaction of loan and therefore if the third defendant is entitled to the amount, she would have to file a separate suit in respect of the same and that it would not be open to her to claim this sum as part of the mortgage money.

4. Both the Courts below held that the sum of Rs. 90 and Rs. 70.23 represented independent loan transactions and that therefore the third defendant was not entitled to claim the same in this suit. The lower appellate Court had also held that the amount due under the mortgage was only Rs. 7,000 and since that had been deposited on 16th February, 1967, itself, the plaintiffs were entitled to mesne profits as and from that date.

5. But on the question of costs, the trial Court held that the plaintiffs were not entitled to the costs of the suit and that the third defendant was entitled to be paid her costs. This decree was given in the view that though in the counter filed by the first and second defendants in O. P. No. 28 of 1967, it was stated that they had assigned their rights to the third defendant, the plaintiffs did not choose to implead her as a party to that petition. Even after the dismissal of the original petition, before the filing of the suit, they did not tender the amount to the third defendant and therefore the third defendant was entitled to her costs of the suit and the plaintiffs were not entitled to their costs

The lower appellate Court took the view that there were suspicious circumstances relating to the assignment of the mortgage in favour of the third defendant, that on the date when the original petition was filed on 7th February, 1967, the assignment was not registered and that therefore the tender in favour of the first and second defendants, the assignors, was valid, which disentitled the third defendant from claiming any costs in the suit. In that view, the lower appellate Court allowed the costs of the plaintiffs and refused the costs of the third defendant.

6. The first question that arises for consideration in this appeal is whether the order of the lower appellate Court with regard to costs is sustainable in law. This being a mortgage suit, the question of costs will have to be considered with reference to Order 34, rule 10 of the Civil Procedure Code, which runs as follows:

> "In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption the Court shall, unless in the case of the costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment."

It has been held by this Court in *Chidambaram Chettiar* v. *Ramaswami Chettiar*[1], and *Minakshi Ayyar* v. *Achalier*[2], that in a suit for redemption the Court is bound to give the mortgagee his costs of the suit unless the Court is of opinion that his conduct has been vexatious or unreasonable so as to disentitle him thereto ; nor can he, where his conduct was neither vexatious nor unreasonable, be asked to pay the costs of the person suing for redemption. In such cases the discretion vested in the Court under section 35 of the Code of Civil Procedure in regard to costs would have to be read, subject to the provisions of Order 34, rule 10. Though in terms Order 34, rule 10 is applicable to costs incurred by the mortgagee, since the date of the preliminary decree, up to the time of actual payment, the principle in that provision has been held to apply even with regard to costs of the suit of the mortgagee prior to the date of the preliminary decree. But in dealing with the costs of a mortgage suit, the Court would be exercising its discretion under section 35 of the Civil Procedure Code as well. In so exercising its discretion, if the mortgagee is not guilty of misconduct, the Court must award to him the costs of the suit. It has been so held by a Division Bench of the Bombay High Court in *Dawoodhbai* v. *Shaikhali*[1].

7. It is, therefore, clear that in a suit for redemption, or in a suit for enforcement of a mortgage, what the Court will have to consider is whether the mortgagee by his conduct has disentitled himself to the costs of the suit. If there were no circumstances, or misconduct disentitling the mortgagee from claiming the costs, the Court would have no option, but to give him the costs of the suit and to include that amount in the amount due under the mortgage. Only in cases where the Court finds that the mortgagee is disentitled to the costs, it will have to go into the further question, whether it could use its discretion in awarding costs to the mortgagor. That discretion will have to be exercised according to the well-known principles relating to the awarding of costs. The lower appellate Court approached the question from the point of the view of the mortgagors-plaintiffs and came to the conclusion that they tendered the amount to the assignor prior to the assignment itself, that was all that was required of them to be done before the filing of the suit and that therefore the plaintiffs were entitled to the costs and the third defendant was not entitled to her costs. As seen from the above, this approach of the lower appellate Court could not be sustained.

8. The learned Counsel for the respondents contended that, on the facts of this case, though nothing could be said about the conduct of the assignee as

1. (1939) 1 M.L.J. 687 : 49 L.W. 525 : A.I.R. 1939 Mad. 654.
2. (1942) 2 M.L.J. 124 : I.L.R. (1943) Mad. 205 : A.I.R. 1942 Mad. 592.

1. A.I.R. 1953 Bom. 445.

disentitling her from costs, the plaintiffs should be held to be entitled to their costs. He argued that on the date when the plaintiffs tendered the money, or deposited the same to the credit of the original petition, the assignment deed was not registered, and that therefore the tender was validly made to the assignors. On such valid tender being made, the plaintiffs got a right to file a suit for redemption and that right could not be taken away by the voluntary act of the assignors in assigning the mortgage in favour of the third defendant. Nor will the assignment require the plaintiffs to again make a tender to the assignee. He further submitted that if the assignors were to claim costs they would be disentitled since there was a valid tender in their favour. Such disentitlement of the assignor will also attach to the assignee in this case as the assignment itself was subsequent to the tender. In other words, what the assignee got under the assignment are the rights and liabilities of the assignor and therefore the third defendant had disentitled herself from claiming the money. There is great force in this contention. But I am unable to accept this contention. As already noted, in the matter of costs in a suit for redemption, the only thing that is relevant for the Court to consider is whether the mortgagee by his conduct disentitled himself from claiming the costs. So far as the assignee in this case is concerned, she had not done anything to disentitle her to the costs of the suit. In fact, there is evidence in this case to the effect that it was the assignee who asked the assignors to file a counter in the original petition informing the plaintiffs of the assignment so that they could pay the money due under the mortgage to the third defendant-assignee. In spite of the information given about the assignment, the plaintiffs did not choose to implead her as a party in O. P. No. 28 of 1967. Nor did they make any tender of the amount before the filing of the suit. In view of the special provision under Order 34, rule 10, I am of the view that not only are the plaintiffs not entitled to costs, but also that they are liable to pay the costs of the mortgagee. The judgment and decree of the lower appellate Court in so far as the costs are concerned are therefore set aside and those of the trial Court are restored.

9. So far as mesne profits are concerned, as already stated, the amount was deposited by the plaintiffs on 16th February, 1967, itself and that was available on the date of suit. Though the deposit made on 16th February, 1967, would not enable the plaintiffs to claim mesne profits as and from that date, they are entitled, to claim mesne profits as and from the date of the suit, since the amount was available to the credit of the suit even from the inception. But what is contended by the learned Counsel for the appellant is that the tender of Rs. 7,000 was not of the full amount, that in addition to the sum of Rs. 7,000 the appellant was also entitled to the sum of Rs. 302.23 referred to above and that therefore the appellant is not liable to pay any mesne profits at all in respect of the same until the entire amount is paid. It is also stated that possession had already been handed over and no further question of mesne profits would arise.

10. The question of mesne profits could be considered along with the claim for the sum of Rs. 302.23 as the liability to mesne profits would arise only if the amount deposited is found to be the entire mortgage money. Out of the two sums of Rs. 90 and Rs. 70.23, admittedly, the sum of Rs. 90 is a loan transaction. Though that amount was paid to the mortgagors for the purpose of paying the property tax, that cannot be treated to be the amount due under the mortgage itself, because it represented a separate transaction. Therefore, if the third defendant is entitled to that money, she will have to seek her remedy in a separate suit and cannot claim the amount as part of the mortgage money in this suit itself.

11. So far as the other sum of Rs. 70.23 is concerned, the finding of the trial Court is that this amount represented the half share of property tax paid by the assigners on behalf of the mortgagors. Even so, it is contended by the learned Counsel for the respondents, that the assignment of the mortgage did not in terms assign this amount also in favour of the assignee and as such it could not be included in the mortgage amount. I

think this contention will have to be accepted on the peculiar facts and circumstances of this case. It is admitted that the assignment deed itself did not specifically include the sum of Rs. 70.23. It is only by a receipt issued subsequent to the assignment, the third defendant is able to prove that she paid the amount to the assignors. Inferentially the third defendant claims that that amount is recoverable by her from the mortgagors. I am unable to agree with the learned Counsel for the appellant that this amount is also payable as part of the mortgage money. It may be that the parties did not choose to include this sum in the assignment deed as that will attract additional stamps as a fresh mortgage. But that is not an excuse for not including the same in the assignment itself, if the third defendant wanted to claim the money as part of the mortgage money itself. Therefore, the tender of Rs. 7,000 is valid and the third defendant is not entitled to any more amount under the mortgage. In view of this finding, the third defendant is liable to pay mesne profits only from the date of the suit. It is needless to say that this finding will not in any way affect the rights of the third defendant if any, to file a separate suit for claiming the two sums of Rs.90 and Rs. 70.23 with interest thereon.

12. No other point arises in the second appeal.

13. The second appeal is allowed in part in regard to the costs and mesne profits prior to suit and is dismissed in other respects. The parties will bear their respective costs in the second appeal. The third defendant will be entitled to her costs both in the trial Court and in the lower appellate Court. No leave.

S.J. ——— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam and V. Ramaswami, JJ.*

C. Sundaram .. *Appellant**

v.

Rukmani Ammal and others .. *Respondents.*

Hindu Law—Partition—Suit for —Business started by father—One of the sons claiming it to be joint family business of his father and himself —No nucleus—Nature of proof required to raise presumption of business being joint between father and son.

Where a business was in its origin the exclusive business of the father, whether that business came to acquire a joint family character would depend on the nature of the help or assistance given by the son. It is not every act or work done or assistance given by a son to the father in the conduct of the business that will make the business a joint family business. If the work done or assistance given by the son is such as to lead to the inference that the father had intended to treat his exclusive business as a joint family buiness, then alone the presumption of joint business could be invoked. In invoking such a presumption the joint exertion by the son with his father should be such that the father could be said to have intended to treat the business as belonging to both, or to the joint family. [*Para.* 10.]

Cases referred to:—

Sudarsanam Maistry v. *Narasimhalu Maistry*, I.L.R. (1902) 25 Mad. 149 : 11 M.L.J. 353 ; *Munuswami Chetty* v. *Maruthammal*, I.L.R. (1911) 34 Mad. 211: 20 M.L.J. 687: 7 I.C. 176; *Rajagopala* v. *Seshayya*, A.I.R. 1935 Mad. 368; *Krishnan* v. *Rangachari*, I.L.R. (1965) 1 Mad. 350 : 78 L.W. 1 : A.I.R. 1965 Mad. 340 ; *Santhalingam* v. *Meenakshi Ammal*, (1970) 2 M.L.J. 85 ; *Hari Das* v. *Devkuarbai*, A.I.R. 1926 Bom. 408 ; *Manilal* v. *Bai Sushila*, A.I.R. 1956 Bom. 402;

* Appeal No. 218 of 1968. 19th February, 1974.

Kailashi v. *Shankar*, A.I.R. 1945 All. 164.

Appeal against the decree of the City Civil Court, Madras (Second Assistant Judge) in Original Suit No. 1124 of 1960.

K. N. Balasubramaniam, M. Srinivasan and *S. Desikan*, for Appellant.

M. A. Srinivasan and *M. A. Srinivasan*, for 1st Respondent.

G. T. Ramanujachariar, for Respondents 4 to 8.

The Judgment of the Court was delivered by

Ramanujam, J.—The first defendant in O. S. No. 1124 of 1960 on the file of the City Civil Court, Madras, is the appellant. The first respondent herein filed the suit for partition of plaint A and B schedule properties and for separate possession of her ¼th share therein and for rendition of accounts of the income derived by the first defendant from the properties from 19th April, 1958. Her case was that the properties set out in the plaint A and B schedules belonged to her husband, Chellappa Naicker, the father of defendants 1 to 3 and grand father of defendants 4 to 8, that the said properties were acquired by Chellappa Naicker out of his own earnings, that Chellappa Naicker died on 19th April, 1958, that the plaintiff and defendants 1 to 3 have succeeded to his properties each being entitled to a ¼th share in them, that the first defendant refused to comply with the plaintiff's demand for partition and separate possession of her ¼th share that he set up a will, alleged to have been executed by the said Chellappa Naicker bequeating all the suit properties to him exclusively, that the will set up by the first defendant was not true and valid and that, therefore, she has been compelled to file the suit for the reliefs above mentioned.

2. The first defendant resisted the suit contending that himself and his father Chellappa Naicker constituted an undivided Hindu family, that even at the age of 15 he gave up his studies and joined his father to help him in his trade as tinker and steel trunk manufacturer from 1930 onwards, that the A schedule properties were all acquired out of the earnings of the said joint family trade, that his father threw the earnings into the common family pot and the properties were acquired out of the earnings of the joint family business and that in any event the acquisition of properties were out of the joint exertions of himself and his father. He further contended that his father had executed a will under which the properties have been bequeathed exclusively to him and that the plaintiff and defendants 2 and 3 have no rights therein. He also pleaded that even if his father is taken to have died intestate, the properties being joint family properties, he is entitled to a half share in his own right and to a ¼th share in the share left by his deceased father. The first defendant also pleaded that even during the lifetime of his father the said business had been gifted to him. Thus the substantial defence taken by the first defendant is that the plaint A and B schedule properties are not divisible and that they belonged exclusively to him and that the business conducted in the name of the father also belonged to him exclusively.

3. Defendants 2 and 3 supported the case of the plaintiff and they prayed for allotment to them of ¼th share each in the plaint schedule properties as also the business.

4. Defendants 4 to 8 who are the sons of the first defendant contended that the business and the properties set out in A and B Schedules are ancestral and joint family properties as they have been acquired with the help of ancestral nucleus and by joint exertions of their father and grandfather. They also pleaded that the business of "Dhanalakshmi Brand Steel Trunk Works" is a joint family business and not the exclusive business of their grandfather.

5. On these rival contentions the Court below had to consider (1) whether the properties set out in the plaint A and B schedules as also the business of Dhanalakshmi Brand Steel Trunk Works belonged exclusively to the first defendant as a result of the will said to have been executed and the gift said to have been made by his father Chellappa Naicker in favour of the first defendant and (2) whether the suit properties and the business continued to be the exclusive properties of Chellappa Naicker at the time

of his death, or whether they belonged to the joint family of the first defendant and his father.

6. Though a will has been set up by the first defendant with a view to claim the properties as his exclusive properties, having regard to the fact that the genuineness of the will was successfully challenged by the plaintiff and defendants 2 and 3 in *C. Sundaram* v. *Rukmani Ammal and others*[1] and the decision in the said testamentary suit has also been affirmed by a Bench of this Court in (*C. Sundaram* v. *Rukmani Ammal and two others*)[2] the first defendant has practically given up the defence based on the alleged will. Even the plea of gift put forward by the first defendant as the basis of his claim for the exclusive ownership of the business had been given up at the trial and he has specifically admitted in his evidence as D. W. 1 that there was in fact no gift of the business by his father to him. Therefore, we have to proceed on the basis that Chellappa Naicker died intestate, and that there was no gift of the business exclusively to the first defendant by Chellappa Naicker during his lifetime. Then the only substantial question that is to be decided is as to whether the suit properties and the business belonged to the joint family or whether they are the exclusive properties of Chellappa Naicker. If the properties and the business belonged to Chellappa exclusively, then the plaintiff and defendants 1 to 3 will be entitled to a ¼th share each thereir. However, if they belonged to the joint family of Chellappa and his son, then the plaintiff and defendants 2 and 3 will become entitled to only a 1/8th share each and the first defendant will be entitled to a 5/8th share. The Court below on a consideration of the evidence held that the suit properties and the business in question were the selfacquired properties of Chellappa and, therefore, the plaintiff became entitled to a ¼th share in plaint A and B schedule properties as well as in the business.

7. Aggrieved against the decision of the Court below, the first defendant has come before us and he contends that on the evidence the suit properties as also the business should be taken to belong to the joint family of himself and his father. Though the first defendant put forward many alternative pleas, he has confined himself only with the plea that the properties set out in A and B schedules have been acquired from the income from the business in steel trunks and that the said business has been started and continued with joint exertions of himself and his father and, therefore, the suit properties as well as the business should be taken to belong to the joint family. It is also the plaintiff's case that the properties covered by the suit have been acquired with the income from the business though she would state that the business is the exclusive business of Chellappa Naicker. Thus, the ownership of the buiness is very material to find out the character of the properties set out in A and B schedules which have been admittedly purchased from the income of the business.

8. As regards the business, the first defendant, as already stated, put forward various pleas which were somewhat inconsistent. He stated in his written statement that the business was started with the joint family nucleus. Then he stated that the business though started by his father earlier without the aid of joint family was continued by the joint exertions of himself and his father and, therefore, it should be taken to be the joint family buiness of himself and his father. But at the trial the first defendant has not adduced any evidence to show that the family had any nucleus so as to enable his father to start the business in question. Therefore, the only plea put forward by the first defendant that has to be considered is whether the business which was admittedly started by his father in the year 1920 when the first defendant was only 15 years old without the aid of the joint family had become the joint family business after 1950 when the first defendant is said to have actively helped his father in the business.

9. Though the first defendant stated at one stage that the steel trunk business was started with joint exertions,

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1. T.O.S. No. 6 of 1960 (O.S.A. No. 6 of 1960).
2. O.S.A. No. 41 of 1961.

that cannot obviously be true for the reason that in the year 1920 when the business was first started he could only be below 10 years of age. Having regard to the admitted fact that there was no joint family nucleus to enable the father to start the business as a joint family venture and the business not having been started with the joint exertions of the first defendant, we can only proceed on the basis that the business in question was started by the father with the funds of his own. It is now well-settled that when the members of a joint family, by their joint labour, or in their joint business acquired property, that property, in the absence of a clear intention to the contrary, would be owned by them as joint family property and their male issue would acquire a right by birth in such property. But if a single individual acquired properties by his own exertions without any assistance from the ancestral property, his male issue will certainly take no interest in it. In *Sudarsanam Maistry* v. *Narasimhalu Maistry*[1], a Bench of this Court held that the property acquired by all the members of the family by their joint labour in the absence of an indication of intention to the contrary, should be taken to be joint family property. The same principle was followed in *Munuswami Chetty* v. *Maruthammal*[2], as well as in *Rajagopala* v. *Seshayya*[3]. In *Krishnan* v. *Rangachari*[4], Anantanarayanan and Ramamurti, JJ., expressed the view that if members of a joint family who are joint in status carry on business and acquire property by their joint labour and exertions without the aid of any ancestral nucleus the presumption is that the property so acquired by them would be joint family property in which the son of the acquirer would get a right by birth, unless it is proved that the acquirers intended to own the property as co-owners between themselves in which case alone it will be joint property as distinguished from joint family property. The same view has been taken in *Santhalingam* v. *Meenakshi Ammal*[1]. It is in the light of the above legal position the evidence in this case has to be considered.

10. The first defendant has stated in his written statement that the business was continued by joint labour and industry and the earnings from the business were joint earnings and therefore the suit properties which have been purchased with such earnings are the joint family properties. He also states that from 1930 onwards he actively helped his father in his trade, having acquired all proficiency and skill in the trade. In his evidence he has stated that his father started the business of manufacture of trunks in 1920, that he joined his father in business in 1927-28, that he learnt the work of manufacture of trunk boxes when he was assisting his father, that from 1950 he was doing business exclusively as the father became old, that himself and his father jointly borrowed for purpose of the business and house expenses and that, therefore, the business should be taken to be a joint family business. Admittedly in this case the business was started by the father in 1920 without the help of the joint family nucleus and without any detriment to the joint family. So the business was in its origin the exclusive business of the father. Whether that business came to acquire a joint family character would have to depend on the nature of the help or assistance given by the first defendant. It is not every act or work done or assistance given by a son to the father in the conduct of the business that will make the business a joint family business. If the work done or assistance given by the son is such as to lead to the inference that the father had intended to treat his exclusive business as a joint family business, then alone the presumption of joint business could be invoked. In invoking such a presumption the joint exertion by the son with his father should be such that the father could be said to have intended to treat the business as belonging to both, or to the joint family.

11. The learned Counsel for the appellant relies on the decision in *Haridas* v.

1. (1902) I.L.R. 25 Mad. 149: 11 M.L.J. 353.
2. (1911) I.L.R. 34 Mad. 211 : 20 M.L.J. 687 : 7 I.C. 176.
3. A.I.R. 1935 Mad. 368.
4. I.L.R. (1965) 1 Mad. 350 : 78 L.W. 1 : A.I.R. 1965 Mad. 340.

1. (1970) 2 M.L.J. 85.

Devkuvarbai[1]. In that case one Narayanadas started business in Bombay as a piece goods merchant without the aid of any joint family nuclues and amassed considerable wealth. While he was carrying on business his son Haridas was associated with him in the business. The trial Court found that as the father advanced to old age more burden of the business was shouldered by the son and less by the father, and that the father and son lived and messed jointly. On these facts it held that the business was the joint family business and all the properties acquired with the income therefrom were the joint family properties. The High Court affirmed that view holding that where a father and his son acquired the property by their joint labour and were, besides, joint in food and worship, they must be regarded as having constituted a Hindu joint family even though there may not have been any nucleus of property which had come down from his father or grandfather, and expressed.

> "For the formation of a coparcenary in Hindu Law, such a nucleus is not absolutely necessary, provided the persons constituting it stand in the relation of father and son and other relation requisite for a coparcenary system, and these persons by living, messing and worshipping together, and throwing all the property acquired jointly into one common stock, manifest their intention to deal with one another and with outsiders as members of a co-parcenary system under the the Hindu Law."

The decision in *Manilal* v. *Bai Sushila*[2], was also relied on. In that case also a father was carrying on a business of his own. His two sons also joined the business later and the question arose as to whether the property acquired with the income of the said business could be treated as joint family property. The Court held that as the father and two sons indisputably lived as members of a joint family and both the sons used to actively help the father in carrying on the business started by him without

1. A.I.R. 1926 Bom. 408.
2. A.I.R. 1956 Bom. 402.

any remuneration for the work done by them, it must be regarded as the joint family business. The learned Judges in that case distinguished an earlier decision of the Allahabad High Court in *Kaliashi* v. *Shankar*[1], in which it was held that if a business is started by an adult member of the family separately, the mere fact that his sons who are dependent on him and are being maintained by him give him some help in the carrying on of the business would not necessarily make the business cease to be his own business and make it the joint business of himself and his sons, but the father and the sons may so conduct themselves that from their conduct it may be apparent that the business of the father had become the joint business of the father and the sons by some arrangement between them. With respect, we are inclined to agree with the view expressed in *Kailashi* v. *Shankar*[1], rather than with the view of the learned Judges in *Manilal* v. *Bai Sushila*[2]. It is not every help and assistance given by the son to the father in business without remuneration, that will lead to the presumption that the separate business of the father has become the joint family business. The conduct of the father and the sons with reference to the business should be such as would show an intention on the part of the father to give up his exclusive ownership of the business and to make it the joint business of himself and his sons. It is well-established that the burden of proving that a member of a joint Hindu family threw his self-acquired property into the common stock lies on the person making the assertion and this burden can only be discharged by proof of the fact that the owner of the property clearly expressed his intention to abandon his separate and exclusive right in the property in favour of the members of the joint family and that the intention may be expressed by words or may be inferred from the conduct of the parties. In this case the defendant himself has stated that the licence for the business was issued in the name of his father till his death and that the income-tax and sales-tax

1. A.I.R. 1945 All. 164.
2. A.I.R. 1956 Bom. 402.

returns were submitted and assessments made in the name of the Hindu undivided family of himself and his son. He has also admitted that he has joined in execution of certain mortgages with his father for the purpose of the business because the creditors insisted that he should join in the execution of the mortgages. The income of the business also has been utilised for the purpose of purchasing properties in his father's name. Further, in all the correspondence the first defendant has signed for and on behalf of his father who is shown as the proprietor of the business. On his evidence and the other evidence available in the case it is clear that the father had at no stage till his death given up his exclusive ownership of the business and made it a joint family business. In this connection it will be relevant to note the initial case put forward by the first defendant at the stage of the probate proceedings and later in this suit. While resisting the plaintiff's claim for partition the first defendant had set up a case of outright gift to him of the business by the father even during his lifetime and that can only be on the basis that the business was the exclusive business of the father right through till his death. The first defendant in his deposition has clearly admitted that there was no gift at all. Apart from this the properties purchased with the income of the business were also claimed by the first defendant as having been got by him under the will executed by his father. That also can only be on the basis that the income derived from the business with which the suit properties had been purchased was exclusively the father's and that the business and the income therefrom belonged exclusively to the father and not to the joint family of himself and his father. On the materials we are not in a position to say that the assistance given by the first defendant to the father who was conducting the business during his lifetime is such as to lead to the inference that the father gave up his exclusive right in the business and made it a joint family business. We are, therefore, of the view that the Court below is right in holding that the business was the exclusive business of the father Chellappa Naicker and that the suit properties which have admittedly been acquired with the income of the business are his exclusive properties and that the plaintiff is entitled to a ¼th share in the suit properties.

12. The learned Counsel for the appellant then contends that the Court below erred in relegating the question of the first defendant's liability to account for a sum of Rs. 8,500 alleged to have been removed by him from the almirah on the third day of his father's death, to final decree proceedings. According to the learned Counsel that question has to be decided at the stage of the preliminary decree itself and should not have been relegated to final decree proceedings. The first defendant has questioned the existence of the said asset of Rs. 8,500 at the time of his father's death. The Court below perhaps felt that the evidence as to the existence of the said asset is not sufficient as the parties have concentrated their attention only to the question as to whether the properties are joint family properties or not. As it is, there is only the assertion by the plaintiff and denial by the first defendant as to the existence of the said cash of Rs. 8,500 at the time of the death of Chellappa Naicker. It is only after looking into the accounts of the business and the bank pass books or other documents relating to the business that it is possible to ascertain whether the said cash in fact was kept in the almirah. The Court below having directed accounting in regard to the income derived from the immovable properties and also the rendition of accounts in respect of the business thought it right to relegate the question as to the existence of the cash to the final decree proceedings. In the circumstances of the case we cannot say that such a direction is erroneous.

13. The appeal, therefore, fails and is dismissed with costs of the plaintiff.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam and V. Ramaswami, JJ.*

Prakasam *alias* **Padmini** .. *Appellant**

v.

Rajambal and others .. *Respondents.*

Transfer of Property Act (IV of 1882), (*as amended in* 1929) *section* 58 (c) —*Applicability—Deed of sale—Stipulation for re-transfer by certain date—Sale or mortgage by conditional Sale——Factors to be considered.*

Where in a deed of ostensible sale there is a condition that on payment by the vendor to the vendee of the amount of the sale price by a certain date, the vendee shall transfer the property back to the vendor and the consideration for re-conveyance was the same amount as the conideration for the sale and the property was much more valuable than what was recited in the document and the vendor provided the stamp papers for the document and no patta transfer application had been filed till long after the sale, the transaction cannot be construed otherwise than as a mortgage by conditional sale as defined in section 58 (*c*), Transfer of Property Act.

[*Paras.* 5, 7 *and* 8.]

The payment of kist by the vendee does not in any way alter the situation.

[*Para.* 9]

Cases referred to :—

P. L. Bapuswamy v. *N. Pattay*, (1967) 1 S.C.J. 842: (1967) 2 An.W.R. (S.C.) 8: (1967) 2 M.L.J. (S.C.) 8 : A.I.R. 1966 S.C. 902 : (1966) 2 S.C.R. 918; *Ramachandrayya* v. *Laxminarayana Rao*, (1956) 2 M.L.J. 565 : (1956) M.W.N. 888; *Gounder* v. *Bapuswami*, (1961) 74 L.W. 23 : I.L.R. (1961) Mad 387 : (1961) 1 M.L.J. 445: A.I.R. 1961 Mad. 276.

Appeal against the order of the Court of the Subordinate Judge (II Additional) Tiruchirapalli dated 28th February, 1966 and made in O. S. No. 250 of 1963.

* Appeal No. 428 of 1968. 20*th March*, 1974.

Raj and *Raj*, for Appellant.

R. Sundaralingam, *K. Jaya Raman* and *V. Sundaresan*, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—The plaintiff is the appellant. She is the daughter of one Shanmugha Mudaliar, who died in the year, 1959. The first defendant is the mother of the said Shanmugha Mudaliar and the second defendant is his wife and the mother of the plaintiff. The suit was filed by her challenging certain alienations made by Shanmugha Mudaliar on various grounds. The said Shanmugha Mudaliar had executed a document dated 5th May, 1948 in favour of one Papammal, whose legal representatives are defendants 3 to 6 in the suit. In respect of this transaction, the plaintiff's case was that it was executed at a time when the said Shanmugha Mudaliar was insane, that it was therefore null and void and that no right or interest was created in favour of Papammal. Alternatively it was contended that the document is a mortgage by conditional sale or it is a sale with a right of reconveyance and that in either case the plaintiff is entitled to redeem or to get a reconveyance of the same on payment of the sale consideration of Rs. 8,500 as recited in the document itself. The next transaction which was challenged in the suit is a mortgage dated 23rd August, 1946 executed by Shanmugha Mudaliar in favour of the tenth defendant for a sum of Rs. 2,000. The tenth defendant has assigned the said mortgage in favour of the ninth defendant on 25th November, 1952. The ninth defendant filed a suit, O. S. No. 785 of 1959 on the file of the Court of the District Munsif of Tiruchirappalli, obtained a decree on the mortgage and in execution of that decree he himself had purchased that property. This mor-mortgage in favour of the tenth defendant was challenged on the ground that it was executed by Shanmugha Mudaliar at a time when the was insane and that therefore the said mortgage was invalid and could not have been enforced.

2. The plaintiff also challenged certain other transactions in favour of defendants 7, 8 and 11. Since the appellant

did not advance any argument relating to the transactions in respect of these defendants, we confirm the finding of the Court below in regard to the same and therefore no detailed discussion is necessary.

3. The main contention of the learned Counsel for the appellant in this case is that the finding of the Court below that Exhibit B-2 dated 5th May, 1948 in favour of Papammal is not a mortgage by conditional sale is unsustainable and that it is contrary to law. The document was executed by Shanmugha Mudaliar. It recites that he agreed to convey the property to Papammal in consideration of a sum of Rs. 8,500. Then it sets out the details of the consideration paid amounting to Rs. 8,500 and proceeds to state that since the consideration as stated above has been received, the said Papammal, shall, as per the sale deed, hold and enjoy the property absolutely. There is also a recital that there are no encumbrances over the property and that if any encumbrance is to be found the said Shanmugha Mudaliar shall be liable to discharge the same. Thereafter, we find the following recital in the document :

"மேலே கண்ட சிறிய தொகையை இன்று முதல் 7 வருஷத்தில் மேற்பட்டு 10 வருஷத்துக்கு உட்பட்டு மேலே கண்ட சிறிய துகையை அசலுக்கசலாய் பெற்றுக் கொண்டு என் சிலவில் நீங்கள் மறு சாசனம் செய்து கொடுக்க வேண்டும் என்கிற களுருக்கு உட்பட்டு இந்த சுத்த கிரய சாசனம் என் மஞோராஜியிலும் தங்கள் சம்மதத்தின் பேரிலும் செய்து கொடுத்திருக்கிறேன்."

4. The effect of the above recital is that should the said Shanmugha Mudaliar pay in cash the aforesaid sale consideration of Rs. 8,500 after a period of seven years and within a period of ten years, from the date of execution of the deed, the said Papammal should reconvey the property at the expense of the said Shanmugha Mudliar. The document is styled as a sale deed. But the stamp papers were provided by the vendor Shanmugha Mudaliar himself.

5. The learned Counsel for the appellant contended that the property conveyed under Exhibit B-2 is an extent of 7 acres 94 cents of valuable land, that even at the time of the sale, the property was worth much more than Rs. 30,000, but the consideration shown in the document was only Rs. 8,500, and that neither a patta transfer application was filed at the time of sale, nor was patta transferred till August 1962. Though the liability of reconveyance is after a period of seven years and within a period of ten years from the date of sale, the consideration payable is the same sum of Rs. 8,500, recited in the document, irrespective of the market value of the land as on the date of reconveyance. Further, the document also uses the expression "அசலுக்கு அசலாய்"". The word "அசல்" means "principal". The document thus states that on payment of the principal amount of Rs. 8,500, the property will have to be reconveyed. These facts, according to the learned Counsel, clearly establish that the document is a mortgage by conditional sale and not an absolute sale in favour of Papammal.

6. Section 58 (*c*) of the Transfer of Property Act defines a mortgage by conditional sale and it reads as follows :

"58 (*c*) Where the mortgagor ostensibly sells the mortgaged property—

> on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or
>
> on condition that on such payment being made, the sale shall become void, or
>
> on condition that on such payment being made, the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale, and the mortgagee a mortgagee by conditional sale :
>
> Provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale."

The proviso to the section is satisfied in this case, as the condition is embodied in the document itself. The document also is ostensibly int he form of a sale

deed. The learned Counsel relies on that portion of the definition which states, "on condition that on such payment being made, the buyer shall transfer the property to the seller" and contends that this condition is satisfied in this case and that therefore the document in this case is a mortgage by conditional sale and not an absolute sale. We are of the view that the learned Counsel is well-founded in this contention.

7. It is seen from the evidence that the consideration stated in the document works out at the rate of Rs. 1,015 per acre and that actually the value of the property at the time of the transaction was much more than what is recited in the document. Even D. W. 3 the karnam of the village, who was examined on behalf of the defendants, admits in cross-examination that in 1948, nanja lands in Killiyur were sold from Rs. 700 to Rs. 1,700 per acre, though he would add that the suit lands were not worth more than Rs. 1,000 per acre then. The plaintiff has produced a sale deed, Exhibit A-3, (registration copy) dated 18th March, 1953 under which the property was sold at the rate of Rs. 2,586 per acre. There is no dispute that that property is adjoining the property now under this discussion except that the sale under Exhibit A-3 was about 5 years after the suit transaction. But there is no evidence to show that the price of properties was increasing in that area or that the increase was so much as from Rs. 1,000 to Rs. 2,500 per acre. We should also bear in mind that the suit property is an agricultural land and unlike house sites in urban area, the increase in value of agricultural lands could not have been so phenomenal. In Exhibit B-14, dated 7th August, 1962 which is a lawyer's notice issued by the plaintiff prior to the filing of the suit, the plaintiff had stated that the property was worth much more than Rs. 30,000 at the time of the transaction. Of course, in the reply notice, the defendants had denied that the property was so valuable. But in spite of these assertions by the plaintiff, the defendants had not chosen to let in proper evidence to discredit the evidence of the plaintiff that the suit property was much more valuable than what was recited in the document itself. We have also got the admission of the Karnam as, D. W.3, that even at the time of the registration of the document, no patta transfer application was filed. If really the transaction was intended to be a sale, one would normally expect that such a patta transfer application would be filed even at the time of the registration. We find in this case that as late as August, 1962 there was no patta transfer and that after the lawyer's notice was issued by the plaintiff to the defendants, the defendants appear to have got the patta transferred just prior to the suit.

8. One other important circumstance in this case is that admittedly Shanmugha Mudaliar provided the stamp papers for the execution of Exhibit B-2. Under the Stamp Act, in the case of sales, normally, unless there is a contract to the contrary, it is the purchaser who will have to provide the stamp papers and in the case of mortgages, it is the mortgagor who will have to provide the stamp papers. The supply of stamp papers by Shanmugha Mudaliar is in consonance with the fact that it should have been intended to be a mortgage and not a sale. It may be noted that there is neither allegation much less any evidence that there was any contract to the contrary requiring the vendor himself to provide the stamp papers for the execution of the sale deed. These circumstances, in our opinion, clearly show that the document was intended to be and was a mortgage by conditional sale and not an outright sale of immovable property.

9. We are fortified in this opinion by a decision of the Supreme Court in *P. L. Bapuswami* v. *N. Pattay*[1]. In that case also, the transaction was identically worded and the deed itself is set out at pages 903-904 of the report. After stating that the consideration was settled at Rs. 4,000, the document proceeded to state :

> "As, in all, I have received the sale consideration of Rs. 4,000 as detailed above, you yourself shall, in future, hold and enjoy absolutely the under-

1. (1967) 1 S.C.J. 842 : (1966) 2 S.C.R. 918 : (1967) 2 An.W.R. (S.C.) 8: (1967) 2 M.L.J. (S.C.) 8: A.I.R. 1966 S.C. 902.

mentioned properties. In future, neither myself nor my heirs shall have any right or future claim, whatever, in respect of these properties. There is no other encumbrance, whatever except the encumbrance mentioned above in respect of these properties. In case anything is left out, I am bound to get the same discharged from and out of my other properties........ should I pay in cash the aforesaid sale consideration of rupees four thousand after a period of five years within a period of seven years from the date of the execution of the deed, during the date of expiry of the said deed of any year (the said properties) should be reconveyed for the very same amount to me. This condition is not valid after the aforesaid period."

Except the last sentence that this condition is not valid, after the aforesaid period, the rest of the recitals in the document is almost identical with those in the document now in question. The Supreme Court held that there were a number of circumstances to indicate that the document was a transaction of mortgage by conditional sale and not a sale with a condition for retransfer. In the words of the Supreme Court :

> " In the first place there is the important circumstance that the condition for re-purchase is embodied in the same document. In the second place, there is the significant fact that the consideration for Exhibit B-1 was Rs. 4,000, while the real value of the property was, according to the Munsif and the Subordinate Judge, Rs. 8,000... In the third place, there is the circumstance that the patta was not transferred to the 1st defendant after the execution of Exhibit B-1 by Palani Moopan........................... There is also the circumstance that the kist for the land was continued to be paid by Palani Moopan and after his death, by the sons of Palani Moopan. Lastly, there is the important circumstance that the consideration for reconveyance was Rs. 4,000, the same amount as the consideration for Exhibit B-1."

In those circumstances, the Supreme Court held that the document was a mortgage by conditional sale. Except that the kist was paid by the defendants in this case, all the other circumstances pointed out by the Supreme Court are present in this case. We consider that the payment of kist by the defendants does not in any way alter the situation. The Supreme Court also specifically pointed out that there need not be any debtor-creditor relationship prior to the transaction itself in order to make the transaction a mortgage by conditional sale, though if there had existed a debtor-creditor relationship, even prior to that document that would be a very strong consideration, as pointed out by this Court in *Ramachandrayya* v. *Laxminarayana, Rao*[1]. In the above decision of this Court, it was held further that the circumstances that the stamp papers were purchased in the name of the transferor is also very relevant in holding that the transaction is a mortgage by conditional sale. We may also point out that the decision relied on by the Court below in *Pattay Gounder* v. *Bapuswami*[2], in support of its view that the document is a not a mortgage by conditional sale is the very decision which on appeal was reversed by the Suprme Court in *P. L. Bapuswami* v. *N. Pattay*,[3], referred to already.

10. For the foregoing reasons, differing from the Court below, we hold that the transaction evidenced by Exhibit B-2, dated 5th May, 1948 is a mortgage by conditional sale and not an outright sale of the suit properties.

11. Now that we have held that the document is a mortgage by conditional sale, no further question arises. But it should be pointed out that there is no evidence to show that Shanmugha Mudaliar was insane even at the time of the transaction in 1948, though there is evidence to show that he was not in a sound state of mind in 1955. The document is therefore not vitiated on the ground that Shanmugha Mudaliar was not in a sound disposing state of mind in 1948 when the deed was executed.

1. (1956) 2 M.L.J. 565 : (1956) M.W.N. 888.
2. (1961) 74 L.W. 23 : I.L.R. (1961) Mad. 387 : (1961) 1 M.L.J. 445 : A.I.R. 1961 Mad. 276.
3. (1966) 2 S.C.R. 918 : (1967) 1 S.C.J. 842 : (1967) 2 An.W.R. (S.C.) 8 : (1967) 2 M.L.J (S.C.) 8 : A.I.R. 1966 S.C. 902.

It is not in dispute that if the document were to be construed as a mortgage by conditional sale, the suit is in time and that the plaintiff is entitled to a decree for redemption.

12. Accordingly we set aside the judgment and decree of the Court below in so far as Exhibit B-2 is concerned and there will be a preliminary decree for redemption of the mortgage Exhibit B-2, dated 5th May, 1948. The plaintiff will be entitled to proportionate costs in the suit.

13. Though the learned Counsel challenged the finding of the Court below that the mortgage executed in favour of the tenth defendant was not binding on the plaintiff, since the only ground on which that mortgage was challenged was on the basis that Shanmugha Mudaliar was insane even at the time of that mortgage in 1946 and since that plea has not been established, we have to confirm the finding of the Court below that the mortgage in favour of the tenth defendant is valid and binding or the plaintiff.

14. In the result, the appeal is partly allowed in so far as Exhibit B-2, dated 5th May, 1948 is concerned and dismissed in other respects. The appellant will pay the Court-fee due to the Government on the memorandum of appeal. The parties will bear their respective costs in this appeal.

R. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam and S. Maharajan, JJ.*

M/s. Srinivasa Roadways, Madurai, Yanaikkal, Madurai .. *Appellant.**

v.

Saroja and others .. *Respondents.*

and

Srinivasa Roadways, Madurai through its Managing Partner M. Nataraja Pillai and another .. *Appellants*

v.

Thylambal and others .. *Respondents.*

and

The Madras Motor and General Insurance Company Limited, Madras .. *Appellant*

v.

Saroja and others .. *Respondents.*

and

Thylambal and others .. *Appellants*

v.

Srinivasa Roadways, Madurai through its Managing Partner M. Nataraja Pillai, Madurai and others .. *Respondents.*

and

Srinivasa Roadways Madurai, Yanaikal, Madurai and another .. *Petitioners*

v.

S. Jayachandran (minor) through his father and next friend Swaminathan and others .. *Respondents.*

Motor Vehicles Act (*IV of* 1939), *section* 96 —*Scope of—Collision between bus and lorry —Liability for damages—Driver of the bus having no valid licence—Insurance policy covering risk which it need not cover—Effect.*

Section 96 of the Motor Vehicles Act enables the Insurance Company to defend

*A.A.O. Nos. 262, 263, 291 and 292 of 1970, 282 of 1971 and C.R.P. Nos. 1397, 1398, 1598 and 1599 of 1970. 3rd *April*, 1974.

an action against it on the ground that there has been a breach of a specified ground of the policy and enables the company to incorporate in the policy any of the conditions mentioned in sub-clause (*ii*) of clause (*b*) of section 96 (2), namely, a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving license during the period of disqualification. [*Para.* 5.]

If all the conditions which the section permits including the one which excludes driving by a person who is not duly licensed at the time of the accident, are incorporated in the policy, the insurer will be exonerated of the liability. If on the other hand the policy incorporates only some of the conditions and omits the others mentioned in the statute, the insurer cannot resist liability on the ground that though the policy has omitted the conditions, the conditions are there in the statute. [*Para.* 5.]

If the Insurance Company does not take advantage of the permissible conditions and with its eyes open enters into a contract, whereby it undertakes to cover risks which it need not cover under section 96, then it cannot escape liability. In such a case the terms of the policy ought to guide the Court. [*Para.* 5.]

Cases referred to :

The Motor Owners Insurance Company Limited v. *Munuswami and others*, C.M.A. No. 243 of 1969 ; *Motor Owner's Insurance Company Limited* v. *Daniel*, (1971) A.C.J. 318 : (1971) 2 M.L.J. 377 : 41 Comp. Cas. 922 : 84 L.W. 518 : A.I.R. 1972 Mad. 15.

A. A. O. Nos. 262, 263, 291 *and* 292 *of* 1970, *and* 282 of 1971.

Appeals against the orders of the Court of the Subordinate Judge (Motor Accidents Claims Tribunal), Madurai, dated 6th April, 1970 and made in O.P. Nos. 75 and 143 to 145 of 1968.

C.R.P. Nos. 1397, 1398, 1598 *and* 1599 *of* 1970.

Petitions under Article 227 of the Constitution of India praying the High Court to revise the order of the Court of the Subordinate Judge, Madurai (Motor Accidents Claims Tribunal), dated 6th April, 1970 and made in O.P. Nos. 143, 145, 143, and 145 of 1968.

A. Sundaram Ayyar and *P. Balasubramanian*, for Appellant.

K. C. Srinivasan, G. Ramaswami and *M. A. Sadanand*, for Respondents.

The Judgment of the Court was delivered by

Maharajan, J.—These appeals and Civil Revision Petitions are directed against the common order of the Motor Accidents Claims Tribunal, Madurai, in M.A.C. O.P. Nos. 75 and 143 to 145 of 1968. On 3rd September, 1967, at about 5-30 P.M. between miles stones 274/4 and 274/5 in Madurai-Dindigul Road, there was a collision between bus MDU 6991 belonging to the Kodaikanal Motor Union (Private) Limited, and lorry MDA 1440 belonging to Srinivasa Roadways Limited. A number of persons were inside the bus as passengers at the time of the collision and ter of the passengers received injuries and one of them, Professor Sundaramoorthy, succumbed to his injuries in the hospital about two weeks after the accident. The scene of the accident is a national highway, the tarred portion of which is 22 feet 4 inches wide. There is a mud portion about 4 feet wide on either side of the road. The total width of the road at the scene of accident would therefore be about 30 feet 4 inches. The road is wide enough, therefore, to allow free passage for a lorry and a bus moving in opposite directions. If each of the vehicles had been driven on its right side of the road, there would have been a clearance of at least 14 feet in between the crossing vehicles. But unfortunately, at the time of crossing, the right portion of one of the vehicles came into contact with the right portion of its opposite number and both got badly damaged.

2. The Sub-Inspector of Police, R.W. 2, came to the scene and prepared a rough sketch as per Exhibit B-7. The Motor Vehicles Inspector, R.W. 4, visited the scene the next day and prepared a report as per Exhibit B-19. Strangely enough, neither of them is able to say, from the marks on the road and the relative posi-

tions of the vehicles, which of the drivers was responsible for this tragic collision. We have therefore to fall back upon the oral evidence on record in order to understand how the collision could have happened.

3. As many as five eye-witnesses to the accident were examined by both the parties and they are P.Ws. 2, 5, and 7, who were passengers in the bus and who got injured, R.W. 1, the driver of the bus, and R.W. 5, the driver of the lorry. So far as the drivers of the vehicles are concerned, it is difficult to accept their inherently interested testimony, because each has been eager to put the blame entirely upon the other. We therefore, do not feel disposed to ascribe any weight to the testimony of R.W. 1 or R.W. 5. We are then left with the evidence of P.Ws. 2, 5 and 7. Psychologically, these persons, who were passengers in the bus, might be expected to support the driver of the bus as against the driver of the lorry. But we find all the three of them unanimously saying that it was the driver of the bus by his rashness and negligence that brought about the accident. They say that the bus driver overtook the Meenakshi bus, which was going ahead, that at the time of overtaking R.W. 1 failed to hoot the horn of the bus and that he rashly overtook the Meenakshi bus without waiting for any signal from the driver of that bus permitting him to overtake it. It was as R.W. 1 was overtaking the Meenakshi bus that the accident occurred, according to P.Ws. 2, 5 and 7. P.Ws. 5 and 7 sustained only minor injuries and each of them claimed a trivial compensation of Rs. 1,000. It was therefore immaterial to them as to whether the insurer of the lorry or the insurer of the bus paid the paltry compensation claimed by them. They had absolutely no motive, therefore, to falsely incriminate the bus-driver and exonerate the lorry-driver. We are impressed with the veracity and credibility of their evidence and we disagree with the Tribunal, which rejected their testimony as unbelievable. The two reasons given by the Tribunal for disbelieving the version of P.Ws. 2, 5 and 7 are these. Firstly, it is said that these witnesses did not mention in their statements under section 161, Criminal Procedure Code, before the police that at the time the accident occurred R.W. 1 was overtaking the Meenakshi bus. Section 161, Criminal Procedure Code, statements were taken by the Sub-Inspector in connection with the prosecution launched by him against both the drivers who figured as accused 1 and 2. The statements under section 161, Criminal Procedure Code, have not been produced into Court and it is not possible to say whether in the context in which those statements were recorded it was necessary at all for the witnesses to refer to the accident having occurred at the time R.W. 1 overtook the bus ahead of him. But we find that in the criminal Court these witnesses have referred to this aspect of the matter and we do not think that the objection on the first ground to their testimony has any substance.

4. The second reason given by the Tribunal is that according to P.W. 2, before the accident, the bus had stopped at the level-crossing for some time and then started moving in a northerly direction. It has been elicited from P.W. 2 that the accident took place about a furlong to the north of the level-crossing. The Tribunal thought that the bus could not have picked up sufficient speed while travelling this distance of one furlong, and therefore the bus-driver cannot be held to have driven the bus at a rash speed. We do not think it fair to rely upon P.W. 2's sense of distance. The Motor Vehicles Inspector and the Sub-Inspector went into the box, and the owner of the bus and insurer thereof could have elicited from them what was the exact distance between the level-crossing and the scene of accident. Further, the rashness of the bus-driver consisted, not so much in the speed with which he drove the bus, but in overtaking a bus going ahead of him without sounding the horn of the bus and before receiving any signal from the Meenakshi bus driver permitting him to overtake him. We, therefore, disagree, with the Tribunal and hold that neither of the reasons given by it for rejecting the evidence of P.Ws. 2, 5 and 7 is sound. We are satisfied that their evidence is acceptable and shall be acted upon, in which case we have no option but to hold that it was the driver of the bus MDU 6991 who was responsible

for the accident by his rash and negligent driving.

5. It would then follow that the Kodaikanal Motor Union (Private) Limited, Ammayanaickanur, will be vicariously liable to pay compensation for the victims of the accident. The insurer of Kodaikanal Motor Union (Private) Limited is the Motor Owners Insurance Company, Limited, Belgaum. Though the insurer did not take the objection before the Tribunal that it was not liable to cover the risks involved in the case, because the driver of the bus had no valid licence at the time of the accident, this objection has been taken before us on foot of an admission made by the driver of the bus himself, R.W. 1, to the effect that though he had been holding a licence previously, he had failed to renew the licence for the period from 16th October, 1966 upto 29th September, 1967 and that he actually renewed the licence only with effect from 30th September, 1967. Let us assume that R.W. 1, the bus driver, did not have an effective licence on the date of the accident. The question arises whether this circumstance would exonerate the insurer of the liability to pay compensation. Reference has been made by learned Counsel for the insurance company to section 96 of the Motor Vehicles Act. That section provides that an insurer shall be entitled to defend the action on any of the following grounds, namely,

> "96 (2) (*a*).......................or
>
> (*b*) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely :
>
> (i) a condition excluding the use of the vehicle—
>
> (*a*) ....
>
> (*b*) ....
>
> (*c*) ....
>
> (*d*) ....
>
> (ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification ;..................

While the above provision makes it clear that the right of the Insurance Company to defend is restricted to the various conditions set out in this sub-section, it is also clear from the sub-section that none of these defences will be available to the Insurance Company unless it incorporates these conditions in the policy. The expression in clause (*b*) of section 96 (2) "that there has been breach of a specified condition of the policy, being one of the following conditions" reinforces this conclusion. All that the section does is to enumerate the conditions, which the Insurance Company is at liberty to incorporate in the policy. What the Act in effect tells the Insurance Company is :

> "There are certain risks which, under the statute, you are bound to cover. There are certain other risks, which by negotiating with the owner of the vehicle you may choose to cover at your option, though under the statute you are not bound to cover the same."

Section 96 enables the Insurance Company to defend an action against it on the ground that there has been a breach of a specified condition of the policy and enables the Company to incorporate in the policy any of the conditions mentioned in sub-clause (*ii*) of clause (*b*) of section 96 (2), namely, "a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification.". This clause, it may be noted, contains three sub-clauses which are disjunctive, namely: (1) excluding driving by a named person or persons ; or (2) excluding driving by any person who is not duly licensed ; or (3) excluding driving by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification. The first clause permits an Insurance Company to rid itself of the liability by providing that if an accident occurs while a named person drives the vehicle, the company shall not be liable to indemnify the owner. The second clause enables the Insurance Company to disclaim liability in cases where at the time of accident, the driver is a person who does not hold a licence duly granted to

him. The third clause enables the Insurance Company to disclaim liability in cases where during the accident the vehicle was driven by a person who might not hold a valid licence at the time of the accident, but who had held a licence previously, but who had not been disqualified for holding or obtaining it. In other words, the three-sub-clauses in section 96 (2) (*b*) (ii) indicate the amplitude of permissible exclusion. As the sub-clauses are disjunctive, an option is given to the Insurance Company to exclude at its discretion driving either by a named person or by a person who is not duly licensed or by a person who has been disqualified for holding or obtaining a driving licence or to exclude driving by all these three classes of persons : In other words, it is open to the Insurance Company to refuse to cover a risk brought about by a person like R.W. 1 in this case, who, at the time of the accident, had held a licence, but had no effective licence covering the period of the accident. But, unfortunately, the Insurance Company had in this case exercised its option even to include a person who had held a licence prior to the date of the accident (that is to say, a licence that had expired prior to the date of the accident) and yet was not disqualified for holding or obtaining such a licence at the time of the accident. The insurance policy issued by the Motor Owners' Insurance Company Limited, in this case has been marked as Exhibit B-8. In the schedule to this policy, the limitations as to use of the bus have been defined and it is stipulated that " the vehicle may be driven either by the insured or any other person provided he is in the insured's employ and is driving on his order or with his permission ; provided that the person driving holds a licence to drive the motor vehicle *or has held and is not disqualified for holding or obtaining such a licence*." What is the construction to be placed on the words " the person driving holds a licence to drive the motor vehicle or has held and is not disqualified for holding or obtaining such a licence ? This clause clearly contemplates a person who did not hold a valid licence on the date of the accident, but who had held a licence previously and who had not, at the time of accident, been disqualified for holding or obtaining such a licence. The Insurance Company, with its great business experience, must have thought it right to cover an accident caused by a person who has had considerable driving experience, and yet due to inadvertence or absent-mindedness, has not chosen to renew that licence during the period allowed by law and has been involved in an accident while he had not yet obtained a renewal of the licence. Evidently, the Insurance Company trusts experienced drivers not to drive the vehicle rashly and negligently, this expectation resting upon their past performance rather than upon the technical, but unimportant question whether they have been careful and alert enough to renew the licence within the period allowed by law. Learned Counsel for the Insurance Company says that the proviso should be construed in such a way as to exclude the intention of the Insurance Company to cover driving by a person who did not hold an effective licence at the time of the accident. We are entirely at a loss to accept such a construction. The Insurance Company is given the option to impose conditions which it is permitted by the statute to impose, and to exclude liability when the vehicle is driven by a person who is not duly licensed at the time of the accident. If the Company does not take advantage of the permissible conditions and with its eyes open enters into a contract, whereby it undertakes to cover risks which it need not cover under section 96 of the Act, then it cannot escape liability. In this case, it is the terms of the policy that ought to guide us and those terms make it clear that the Company would be liable even in a case where a driver has held a licence previously but did not hold an effective licence at the time of the accident and has not been disqualified at the time of the accident for holding or obtaining such a licence. Learned Counsel for the Insurance Company relies upon the decision of Natarajan, J., in *The Motor Owners' Insurance Company Limited* v. *Munuswami and others*[1], where the learned Judge, while interpreting section 96 (2) of the Act, has made the following observations :

"The word ' duly licensed ' in section 96 (2) of the Act clearly goes to show that in order to attract the terms of the policy, the driver of the vehicle, on the

1. C.M.A. No. 243 of 1969.

date of the accident, must be a person who is duly licensed or who is not disqualified for holding or detaining a driving licence. The currency of the driving licence is a condition precedent to the attraction of the liability of the insurance company under the terms of the policy of insurance. The disqualification referred to in the sub-clause will have reference only to a current licence held by the driver on the date of the accident or a licence obtained by the driver during the period of such disqualification. It certainly cannot have any reference to a date-expired licence."

After making these observations, with which we respectfully disagree, the learned Judge relied upon the ruling of Raghavan, J., in *Motor Owners' Insurance Company Limited* v. *V. Daniel*[1]. We do not think that the ruling of Raghavan, J., affords any support to the proposition laid down by Natarajan, J. It can be distinguished on the ground that the policy which Raghavan, J., was called upon to interpret incorporated all the conditions laid down in section 96 (2) (*b*) (ii). The thing to look into is the policy and the question to ask is, " Does the policy incorporate any or all of the conditions which the statute permits an Insurance Company to incorporate ?" If it incorporates all the conditions mentioned in the section, including the one which excludes driving by a person who is not duly licensed at the time of the accident, the Insurer will be exonerated of liability. If, on the other hand, the policy incorporates only some of the conditions and omits the others mentioned in the statute, the Insurer cannot resist liability on the ground that though the policy has omitted the conditions, the conditions are there in the statute. If, as in this case, all the conditions laid down in the section are not reproduced in the policy, and the policy positively undertakes to cover liability in respect of an accident caused by a person, who though not having an effective licence at the time of the accident, has not been disqualified to hold a licence, the Company cannot, in disregard of its policy, fall back upon the section and say that despite the contract it has entered into to the contrary, it must be exonerated of liability. We therefore hold that the Motor Owners Insurance Company Limited, Belgaum, is liable, by and under the terms of the policy issued by it, to cover the risk that has occurred in this case. Needless to add that its liability will be limited to Rs. 2,000 per passenger and the cumulative liability of the company for the entire accident would be limited to Rs. 20,000. At the time of the accident the relevant section had not been amended to enlarge the total liability to Rs. 50,000.

6. We shall next examine the reasonableness of the compensation that has been awarded by the Tribunal. So far as the deceased Professor Sundaramoorthy is concerned, the claimants in O.P. No. 75 of 1968 (appellants in C.M.A. No. 282 of 1971), who are the widow, children and mother of the deceased, have been awarded a compensation of Rs. 55,000. The deceased was a Professor of English employed in C.T.N. College, Dindigul, drawing a basic pay of Rs. 420 per mensem and dearness allowance of Rs. 120 per month. He was aged 41 at the time of his death. But for the accident, he could have lived for many more years and he could have been earning upto his 58th or 60th year. He had also chances of promotion. He sustained very serious injuries as a result of which he died two weeks after the accident. The Tribunal was wrong in awarding any compensation for the mental agony of the survivors. It ought to have awarded compensation for the physical and mental agony undergone by the victim. The evidence shows that he was spending Rs. 250 every month upon his dependants. The value of dependancy may therefore be put at about Rs. 4,000 per year. Having regard to his chances of promotion, and having regard to the fact that his wife is only 30 years old and may live for another 30 years, and taking into account other relevant factors such as receipt of the Provident Fund by the widow and the need for making a discount for lump sum of payment of compensation, the amount of Rs. 55,000 fixed by the Tribunal cannot be said to be unreasonably high. We therefore confirm that figure. Out of this amount of

1. (1971) A.C.J. 318 : (1971) 2 M.L.J. 377: 41 Com.Cas. 922 : 84 L.W. 518 : A.I.R. 1972 Mad. 15.

Rs. 55,000 only a sum of Rs. 2,000 would be payable by the Motor Owners Insurance Company Limited and the balance by the Kodaikkanal Motor Union (Private) Limited.

7. Next we may deal with the compensation awarded to the claimant in O.P. No. 143 of 1968. The Tribunal has fixed a compensation of Rs. 250 for the injuries sustained by Jayachandran, the petitioner in O.P. No. 143 of 1968. He has not preferred any appeal. We think the compensation awarded to him is reasonable, and we confirm it. This amount will be payable by the Motor Owners Insurance Company Limited.

8. Saroja, the petitioner in O.P. No. 144 of 1968, has been awarded a compensation of Rs. 10,000. She is 35 years old. During the accident her left leg below the knee was broken and she was put in plaster. Three months later, when the plaster was removed, it was found that the bones had not joined, whereupon she was treated in the hospital at Madurai. She came to the hospital by taxi every time and she was given special caliper. The medical evidence shows that she sustained a compound fracture of both the bones of the left leg and has sustained a permanent 20 per cent. disability. It is the evidence of P.W. 4, the Orthopaedic Surgeon attached to the Government Erskine Hospital, that without wearing caliper, she would tumble down and that in the present state of her disability she cannot work like any other normal person. The injury has permanently affected her gait. The mental agony suffered by her must have been considerable and she has to be compensated for the permanent disability which she has suffered, as well as for the expenses of medical treatment and for taxi charges. Taking all these factors into account, the Tribunal has fixed a compensation at Rs. 10,000 which we think is quite reasonable. Out of this amount, a sum of Rs. 2,000 will be paid by the Motor Owners Insurance Company Limited and the balance of Rs. 8,000 will be paid by the Kodaikkanal Motor Union (Private) Limited.

9. Swaminathan, petitioner in O.P. No. 145 of 1968, sustained only minor injuries and he has been awarded a sum of Rs. 1,000 by way of compensation. We see no reason to interfere with the quantum of compensation awarded to him. This amount will be payable by the Motor Owners Insurance Company Limited.

10. Out of the amount of Rs. 55,000 awarded to the claimants in O.P. No. 75 of 1968, a sum of Rs. 7,000 will be paid to Sengammal, the 4th petitioner, and the balance of Rs. 48,000 will be divided equally among petitioners 1 to 3. The shares of the minors Anusuya and Kannan will remain invested in any nationalised bank so long as they continue to be minors. Thylambal, the 1st petitioner, will be entitled to withdraw her share of Rs. 16,000 and to draw interest from the amounts invested in the names of her minor children for the purpose of meeting the expenses of maintaining them.

11. The appeals and Civil Revision Petitions preferred by the owner of Srinivasa Roadways, namely, C.M.A. Nos. 262 and 263 of 1970 and C.R.P. Nos. 1397 and 1398 of 1970 are allowed as indicated above. So also the two appeals and Civil Revision Petitions preferred by the insurer of the lorry, namely, C.M.A. Nos. 291 and 292 of 1970 and C.R.P. Nos. 1598 and 1599 of 1970 are allowed as indicated above. C.M.A. No. 282 of 1971 filed by the dependants of Sundaramoorthy for enhancement of the compensation is dismissed. There will be no order as to costs.

R.S. ——— *C.M.A. Nos.* 262 *and* 263 *of* 1970 *and C.R.P. Nos.* 1397 *and* 1398 *of* 1970 *are allowed; C.M.A. Nos.* 291 *and* 292 *of* 1970 *and C.R.P. Nos.* 1598 *and* 1599 *of* 1970 *are allowed; C.M.A. No.* 282 *of* 1971 *is dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Natarajan, JJ.*

Union of India owning the Northern Railway represented by the General Manager and another .. *Appellants**

v.

A. Venkataiah. .. *Respondent.*

Civil Procedure Code (*V of* 1908), *sections* 33 *and* 34—*Judgment and decree—Variance*—" *Decree for payment of money* " —*Meaning of—Judgment silent about interest —Jurisdiction of Court to provide for payment of interest in the decree.*

The expression " decree for payment of money " is not to be understood as a technical expression or an expression with some reservation. A suit instituted by a litigant claiming damages either in tort or on breach of contract or for payment of damages by a carrier for non-performance of statutory and other obligations as a bailee, resulting in a decree for damages, which damages are obviously and necessarily computed in terms of money, can also be characterised as a decree for payment of money. [*Para.* 8.]

Section 33, Civil Procedure Code, is a general provision enabling the Court to pronounce judgment after the case has been heard and on such judgment a decree shall follow. Section 34 is a special provision relating to decrees for payment of money. A decree for payment of damages computed in terms of money is to be understood as a decree for payment of money. Section 34 does not need a lever for it to function. It authorises the Court which has to adjudicate upon suits for damages resulting in decrees for money, either to provide for interest in the judgment itself or independently provide for it. It does not depend upon a provision in the judgment to be made by the trial Court, which would be the *sine qua non* for the provision for interest in the decree. The jurisdiction to provide interest in the decree notwithstanding the fact that there is no reference to it in the judgment, is one which is peculiar to money decrees and the Courts are vested with such jurisdiction. [*Para.* 9]

It is only at the time of drafting the decree and signing of the decree by the trial Judge that the question of his discretion springing from his jurisdiction under section 34 of the Code to provide for interest in a money decree would arise. If he does not provide for such interest, it becomes final and the aggrieved party has no relief. It, therefore, follows that if he provides for interest in the decree, it is lawful and is backed up by express statutory provisions and is not questionable on the technical ground that it is *prima facie* at variance with the judgment, which in terms is silent about the provision of interest. [*Para.* 10.]

Cases referred to :—

B. N. Railway v. *Ruttanji Ranji*, (1938) 1 M.L.J. 640 : A.I.R. 1938 P.C. 67 ; *Union of India* v. *P. W. and G. Mills*, A.I.R. 1967 Punj. 497 ; *Kolai Ram* v. *Pali Ram*, (1885) I.L.R. 7 All. 755 ; *Ramamurthi* v. *Narasimhan*, A.I.R. 1957 Andh. Pra. 476 ; *The Union of India* v. *The West Punjab Factories Limited*, (1966) 1 S.C.J. 350 : (1966) 1 S.C.R. 580 : A.I.R. 1966 S.C. 395.

Appeal against the decree of the City Civil Court (VIII Assistant Judge), Madras, dated 28th February, 1967 and passed in O.S. No. 951 of 1963 and Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to amend the decree of the lower Court (O.S. No. 951 of 1963, City Civil Court, Madras) in accordance with the judgment by deleting the interest portion in clause (1) of the decree.

P. S. Srisailam, for Appellant.

V. N. Srinivasa Rao and *C. S. Rajappa*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The Union of India, owning the Northern Railway and the Southern Railway, respectively represented by their General Managers, are the appellants. The plaintiff is a merchant carrying on business in betel leaves, and his

*Appeal No. 60 of 1969 and C.M.P. No. 3995 of 1974. 18th April, 1974.

course of dealings extends to trading in North India as well. It is usual for the plaintiff to consign such betel leaves in specially prepared baskets, each basket containing about 3,000 leaves, and consign them through the Grand Trunk Express and the Janata Express belonging to the appellants to the various stations in North India. In the course of the dealings between 25th March, 1962 and 24th June, 1962, the respondent-plaintiff consigned from Madras such betel leaves packed in specially prepared baskets for being carried to Lucknow and Kanpur within the jurisdiction of the first appellant. As the goods were perishable, special precautions were taken by the respondent and the respondent expected that the carriers would take the goods as fast as they could and deliver the same at the respective places of destination. The plaintiff naturally expected equally that the carriers would take all reasonable precaution to carry such perishable goods after taking all reasonable caution regarding their preservation in the course of the carriage. It appears that during such period, 450 baskets of betels were not delivered at the respective places of destination and 169 baskets thereof were a total damage to the respondent. Consequent upon such injury caused to him, the plaintiff came to Court after issuing the due notices under the provisions of the Railways Act and the Civil Procedure Code, for damages at the rate of Rs. 16 per basket even though, according to the plaintiff, he was entitled to Rs. 20 per basket. In fact, his claim towards such damages was partially met, and in the plaint, the plaintiff has given credit to such of those amounts paid by the appellants in partial admission of the damage caused to plaintiff's goods in the course of transit. The plaintiff, prior to the action, called upon the defendants to pay damages as claimed by him earlier in the notices, and as he could not get satisfaction of his claims as made by him, he has come to Court seeking a sum of Rs. 9,090 which, according to him, represented the value of the damaged goods, and prayed for, a decree in that sum.

2. The second defendant in the action (the second appellant) in its written-statement took up various stands, such as that the respondent had no right to sue; that there was no negligence on the part of the Railway Administration as carriers when they carried the goods of the respondent to the respective places of destination; that the goods became damaged on account of their inherent perishable nature; and that the goods were defectively packed; and on such pleas, it denied the claim *in toto*, stating that the short delivery as well as the total loss as claimed by the plaintiff was not due to any overt act on the part of the Railways as carriers. In any event, the second defendant stated that the consignments were booked at the owner's risk and that the Railways were absolved from liability. On the merits, the second defendant pleaded that the plaintiff did not properly give credit to the amounts received by him from the Railway Administration in regard to certain consignments towards which damage was more or less admitted. In the ultimate analysis, in the written-statement of the second defendant, which was adopted by the first defendant, the defendants pleaded that they were not liable for the suit claim.

The trial Court framed the following issues:

(1) Have the defendants made payments as alleged in paragraph 7 of the written statement of the first defendant towards the plaint claim and are they entitled to credit therefor as claimed therein?

(2) Has the plaintiff right and title to sue?

(3) Is the alleged damage and shortage due to the negligence or misconduct on the part of the defendants?

(4) What was the packing condition of the goods at the time of booking?

(5) Is not the damage due to the inherent perishable nature of the consignment?

(6) What is the extent and value of the goods alleged to have been short delivered and damaged?

(7) Have valid and proper notices both under section 78-B of the Railways Act and section 80 of the Civil Procedure Code, been given?

(8) To what relief is the plaintiff entitled ?

3. On issue No. 2, the learned Judge held that the respondent had the right and title to sue as consignor and as the consignee was not a person different from the consignor, the respondent had the right to institute the action. On issues 3 to 5, which pinpointed on the damage and shortage of the goods, and whether such damage was the result of the negligence and misconduct on the part of the Railway Administration, the trial Judge found that the alleged damage and shortage were due to the negligence and misconduct on the part of the appellants and not due to the inherent perishable nature of the goods, as contended by the defendants. On issues 1 and 6, with which practically we are concerned in this appeal, the learned Judge, after considering the evidence before him, and after hearing the parties, decreed the suit in a sum of Rs. 7,728-40 holding that the plaintiff is entitled to damages at the rate of Rs. 15 per basket. As a matter of fact, the calculation made by the learned Judge even in the judgment appears to be not quite correct, as the damages will work out to something more than that awarded by him, if the damages were to be reckoned at the rate of Rs. 15 per basket. As a matter of fact, it would come to Rs. 9,285 and after deducting the sum of Rs. 812 received by the plaintiff, it would amount certainly to something more than the computed amount of Rs. 7,728-40. However, that need not detain us.

4. The point to be noticed at this stage is that the learned Judge did not provide for interest on the computed amount of damages, but in the decree that ensued provided for it in the following terms :

> " That the defendants do pay plaintiff Rs. 7,728-40 (Rupees seven thousand seven hundred and twenty-eight and paise forty only) with interest thereon at 6 per cent. per annum from the date of the plaint, *viz.*, 6th April, 1963 till date of realisation."

5. As against this judgment and decree of the Court below, the appellants have presented this appeal. But it is singular to note that in the memorandum of valuation the appellants have stated thus :

> " The appellants are claiming relief in the appeal only to the extent of Rs.3,000 inclusive of interest at 6 per cent. per annum from the date of plaint (6th April,1963) to date of filing the appeal."

6. On a calculation of the interest portion of the subject-matter of the appeal, we find that it works out to Rs. 2,125.20 and the balance of Rs. 874.70 obviously refers to the portion of the damages awarded by the trial Court when it decided issues 1 and 6 in the suit.

7. Having this background, the learned Counsel for the appellants contends firstly that inasmuch as the judgment is silent about any provision for interest either *pendente lite* or after the decree has been passed, there is *prima facie* a variation between the judgment and the decree and to that extent the provision in the decree for payment of interest ought to be set aside. The second contention of Mr. Srisailam, the learned Counsel for the appellants, is that there is no positive proof of the market-value of the goods at the places of destination and the materials placed by the respondent during the trial are not sufficient for the Court to conclude with any reasonable precision that any particular sum would represent the market value of the goods at the places of destination. On the other hand, Mr. Srinivasa Rao, the learned Counsel for the respondent, would state that there is no variation between the judgment and the decree, and having regard to the fact that the suit itself is one for damages, the provision for interest on such reckoned damages, after trial, either for the period during the pendency of the suit or for a period posterior thereto is a normal feature in such cases, and it does not in any way militate against the provisions of the Civil Procedure Code, or the well understood precedents in relation thereto. Regarding the market-value of the goods at the places of destination, it is said that enough data was provided before the trial Court for it to ascertain the quantum of the damages suffered by the plaintiff by utilising the appellants as carriers of their betel leaves, which were admittedly carried from one station within the jurisdiction of the second appellant to the other stations of destination within the jurisdiction of the first appellant.

8. Regarding the first contention of the learned Counsel for the appellants, that there is a variance between the judgment and the decree in the matter of provision for interest and that therefore the appellants are entitled to seek relief at the appellate stage for the exclusion of such payment of interest awarded by the Court below; we are of opinion that that contention is without substance. Section 34 of the Code of Civil Procedure, is a special provision providing for interest in the case of a decree for payment of money. It runs as follows :—

"34 (1). Where and in so far as a decree is for payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit shall not lie."

Sub-section (1) of section 34 is relevant for the issue and it is capable of being considered in three broad divisions. In the decree in a suit for the payment of money, the Court can at its discretion, provide for the payment of reasonable interest on the principal adjudged (*a*) from the date of suit to the date of decree ; (*b*) in addition direct the payment of any interest adjudged on such principal sum for any period prior to the institution of the suit ; and (*c*) may also direct the payment of further interest at such rate not exceeding 6 per cent. as the Court deems reasonable on such principal sum from the date of the decree to the date of payment or such earlier date as the Court thinks fit. The expression "decree for payment of money" is not to be understood as a technical expression or an expression with some reservation. A suit instituted by a litigant claiming damages either in tort or on breach of contract or for payment of damages by a carrier for non-performance of a statutory and other obligations as bailee, resulting in a decree for damages, which damages are obviously and necessarily computed in terms of money, can also be characterised as a decree for payment of money. Therefore, a decree for damages computed by the trial Court after hearing parties, which sum is reckoned by it on the evidence noticed by it, is to be treated and considered as a decree for payment of money. Thus understood, the second heading under which additional interest could be granted under section 34 in cases of a decree for payment of money would not generally be invokable in cases where the suit is purely for damages. The second head relates to payment of additional interest on the principal sum adjudged for any period prior to the institution of the suit. In a case for damages, it would be speculative to award such interest for a period prior to the institution of suit, because a person claiming such damage cannot be said to have been injured unless and until he quantifies the same in his own way and seeks for relief in a manner known to law. Such awarding of damages for a period prior to the institution of the suit would militate against the well accepted principle of *damnum sine injuria*, without injury there cannot be a damage. In the case of damages, the party must suffer an injury and then ask for it. In a case similar to the one under consideration, if such interest is awarded prior to suit it would be damages over damages, which is not postulated in law. Therefore, in cases like the one before us, any interest as additional interest for a period prior to the institution of the suit ought to be automatically excluded. The next question is whether the Court can award interest from the date of the suit to the date of the decree and thereafter. These two reliefs could be granted by the Court in its discretion under the first and the third heads into which we have brought the pres-

criptions in section 34. That such interest could be granted by Court is well recognised and cannot be disputed at all. (See *B. N. Railway* v. *Ruttanji Ramji*[1], and *Union of India* v. *P. W. and G. Mils.*[2] If, therefore, we come to the conclusion that the Court has the discretion to award interest from the date of the suit to the date of the decree as also further interest at such rate not exceeding 6 per cent. per annum as the Court deems reasonable on the adjudged sum from the date of the decree to the date of payment, and if such provision has been made only in the decree, and if the judgment is silent about it, can it be said that there is a variation between the judgment and the decree, as contended, disentitling the respondent from the relief granted by the Court below?

9. The Civil Procedure Code makes a distinction between a judgment and a decree. This is obvious from the language in sections 33 and 34. Section 33 is a general provision enabling the Court to pronounce judgment after the case has been heard and on such judgment, a decree shall follow. Section 34 however is a special provision relating to the decree for payment of money. We have already expressed the view that a decree for payment of damages which is computed in terms of money is to be understood as a decree for payment of money. In such cases, there is intrinsically a possibility envisaged in the Civil Procedure Code itself, which enables the Court, which has to adjudicate upon suits for damages resulting in decrees for money, either to provide for interest, if they think fit, in the judgment, or independently provide for it, as expressly authorised under section 34 of the Civil Procedure Code. Section 34 acts on its own and does not need a lever for it to function. It does not depend upon a provision in the judgment to be made by the trial Court, which would be the *sine qua non* for the provision for interest in the decree. The jurisdiction to provide interest in the decree notwithstanding the fact that there is no reference to it in the judgment, is one which is peculiar to money decrees, and the Courts are vested with such jurisdiction. As early as in *Kolai Ram* v. *Pali Ram*[1] a Division Bench of the Allahabad High Court in a similar situation, considering the meaning of section 206 of the Civil Procedure Code, equivalent to section 34 of the present Code, observed thus :

> "We are asked to amend this decree on the ground that it is at variance with the judgment in the appeal, inasmuch as the decree contains an order for payment of interest from the date of suit onwards, whereas interest was adjudged by the judgment for the period prior to the institution of the suit only. But no variance with the judgment is involved in this *additional order* contained in the decree. The decree agrees in all the respects with the judgment according to the requirements of section 206 of the Civil Procedure Code............the Court is competent under section 209 to '*order in its decree*' that interest at a reasonable rate should be paid on the principal sum adjudged from the date of suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at a reasonable rate on the aggregate sum so adjudged from the date of the decree to the date of payment, or such earlier date as the Court thinks fit."

We respectfully adopt the observations of the learned Judges.

10. There is also a clue in sub-section (2) of section 34, which provides for the interpretation of the meaning and content of section 34 of the Civil Procedure Code. Sub-section (2) of section 34 as already noticed reads :

> "Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie."

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1. 65 I.A. 66 : (1938) 1 M.L.J. 640 : 173 I.C. 15 : A.I.R. 1938 P.C. 67.
2. A.I.R. 1967 Punj. 497.

1. (1885) I.L.R. 7 All. 755.

It is therefore clear that it is only at the time of drafting the decree and signing of the decree by the trial Judge that the question of his discretion springing from his jurisdiction under section 34 of the Civil Procedure Code to provide for interest in a money decree would arise. If he does not provide for such interest, it becomes final and the aggrieved party has no relief. It, therefore, follows that if he provides for interest in the decree, it is lawful and is backed up by express statutory provisions and is not questionable on the technical ground that it is *prima facie* at variance with the judgment, which in turn is silent about the provision of interest. In *Ramamurthy* v. *Narasimham*[1], Umamaheswaram, J., stated that it cannot be contended that because no subsequent interest was provided for in the judgment, it ought not to be included in the decree. This again is based on the literal interpretation of section 34 of the Civil Procedure Code and it is the primordial intent and purpose in the case of a decree for money. We are, therefore, unable to agree with the argument of the learned Counsel for the appellants that the provision for interest ought not to have been made in the decree and such interest so provided cannot be granted to the respondent.

11. The second contention which is, of course, very hesitant and which, in the circumstances sinks into insignificance, is the attack on the grant of damages of Rs. 874.70. It is very curious that the appellants have filed this appeal against the trial Court's decree for the grant of damages in the sum of Rs. 874.70 when almost 9/10 of such claim has not been questioned. No doubt, very eloquent grounds of appeal have been drafted to contest the claim for damages awarded by the Court below, but for reasons best known to the appellants themselves, they have restricted in the Memorandum of valuation the appeal to an attack on about 1/10 of the claim for damages. This itself is sufficient to show that the second contention of the appellants is not only hesitant but hopelessly devoid of any reasonableness.

1. A.I.R. 1957 A.P. 476.

12. The contention of Mr. Srisailam is that the plaintiff did not afford ample proof before the trial Court to sustain his claim for damages. We do not see any substance in this argument at all. The plaintiff produced documents such as Exhibits A-75, A-76, A-79, A-80, B-24, B-25, A-77, A-83, A-81, B-16, A-82, B-28, and A-78, to prove his claim for damages. In fact, in the plaint, the plaintiff would seek damages at the rate of Rs. 20 per basket, but he restricted his claim to Rs. 16 per basket. In the evidence so let in, he has placed such hypothesis before the trial Court to prove the market value of similar goods at the places of destination during the relevant months, namely, March, April, May and June, 1962. During March, the price ranged between Rs. 14 and 22 per basket; in April, it ranged between Rs. 14 and 18; in May between Rs. 10 and 13; and in June between Rs. 10.35 and 14. It is fairly conceded that there is no contrary evidence let in by the appellants to prove that such was not the market price of similar goods at or near the place of destination. The learned Judge considered these exhibits as also the oral evidence let in by the plaintiff and came to the conclusion that such market rate was ranging between Rs. 10 and 22 between March and June, and he assessed the damages at Rs. 15 per basket, but actually gave Rs. 13.80 per basket as the computable damages to which the plaintiff would be entitled. Undoubtedly 'market price' means the price which prevails at the place of destination and such is the data on which damages have to be reckoned particularly in cases of contracts of affreightment and carriage. In the absence of any other proof or material, we are unable to state that the rule in *The Union of India* v. *The West Punjab Factories Limited*[1], to the effect that the market price at the time of the damage is the measure of the damage to be awarded and that the price has to be reckoned at the place of destination has in any way been violated in the instant case. What is however contended is that there is no proof that these very goods which were consigned by the plaintiff to his commission agents

1. (1966) 1 S.C.J. 350 : (1966) 1 S.C.R. 580 : A.I.R. 1966 S.C. 395.

in North India were sold at a higher price or at a particular price. This is, of course, one of the methods by which the plaintiff can substantiate his case. But nothing prevents him in law from adducing such acceptable evidence such as the market price of similar commodity at or near the place in question to prove his claim for damages. The plaintiffs in the instant case had adopted this alternative method. For this reason alone, the plaintiffs method of proof based on the evidence let in by him, which remains uncontroverted, cannot be lightly brushed aside. We accept the evidence adduced on behalf of the plaintiff as regards the market price of similar goods at or about the time when the consigned goods were damaged and we agree with the Court below that the plaintiff is entitled to reasonable damages and that the sum of Rs. 13.80 per basket awarded by the Court below as equable damages sustained by the plaintiff is neither unreasonable nor unjustified.

13. In the view that we have already expressed on the first point urged by Mr. Srisailam, the application—C. M. P. No. 3995 of 1974 seeking for amendment of the decree in accordance with the judgment by deleting the interest portion in clause (1) of the decree, has to be dismissed, and it is accordingly dismissed.

14. The appeal therefore fails and is dismissed. In the peculiar circumstances of the case, there will be no order as to costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Natarajan, J.*

Sadagopa Ramanuja Jeer the present Madathipathi and Adheenakartha of Srivalliputhur Manavala Mahamuni Mutt .. *Appellant**

v.

Sri Koil Kandadai Vathula Annan Sri Rengachari Swamigal through Sri V. S. Rangaswami Iyengar, Advocate, Madurai .. *Respondent.*

(A) *Limitation Act (IX of 1908), section 15—Execution proceedings—Stay of proceedings by injunction issued by Court—E. P. closed for statistical purposes—Effect—Decree-holder whether could claim the benefits under section 14 in computing period of limitation.*

(B) *Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), section 41—Inam grants of lands to Mutt—No stipulation for resumption on failure to perform service—Effect—Whether can be sold in execution of decree.*

(C) *"Confirmed" occurring in Inam Fair Register—Presumption.*

The law is well settled that while computing the period of limitation for any suit or application for decree execution of which had been stayed by injunction, the time of the continuance of the injunction is to be excluded. [*Para.* 5.]

The closing of execution for the purpose of record will not amount to a judicial disposal of the execution petition. It necessarily follows that the execution petition must be deemed to be in suspended animation and it is open to the decree-holder to again revive the execution proceedings by means of a suitable petition at the appropriate time.

[*Para.* 5.]

There is a marked difference between inam grants in favour of individuals burdened with a service and inam

*A.A. O. No. 481 of 1972 and C.M.P. No. 12550 of 1972. 30*th April*, 1974.

grants in favour of institutions for religious and charitable purposes and the restrictions impressed upon a grant to a grantee of the former category cannot be held to exist in so far as the grants of the latter category are concerned. [*Para.* 8.]

Section 41 of the Madras Hindu Religious and Charitable Endowments Act (1959) prohibits a voluntary transfer of inam land by exchange, gift, sale or mortgage and any lease for a term exceeding five years. Any of the above mentioned acts can be entered into by or on behalf of the institution, except a transaction amounting to gift, with the sanction of the Government. It is clear that it is not as if an exchange, sale, mortgage, lease etc., can never be entered into by a religious or charitable institution in respect of its properties obtained by inam grant. The restrictions will not apply to the case of a forced sale in the case of the property of a religious or charitable institution brought to sale in Court-auction by a decree-holder. [*Para.* 9.]

If the word "confirmed" appears in the Inam Fair Register as against an inam, the presumption would be that the grant of the inam was made prior to enfranchisement. [*Para.* 9.]

Cases referred to :—

Muthu Veeranna v. *Muthu Venkatarama*, (1951) 1 M.L.J. 196 : A.I.R. 1951 Mad. 711 ; *Prem Lata Agarwal* v. *Lakshman Prasad Gupta*, (1971) 2 M.L.J. (S.C.) 1 : (1971) 2 An.W.R. (S.C.) 1 : (1971) 2 S.C.J. 55 : (1971) 1 S.C.R. 364 ; *Anjaneyalu* v. *Sri Venugopala Rice Mills Limited*, (1922) I.L.R. 45 Mad. 620 (F.B.) : 42 M.L.J. 477; *Sundararajulu Naidu* v. *Pappiah Naidu*, (1938) 1 M.L.J. 686 : I.L.R. (1938) Mad. 767 ; *Govindoss* v. *Rajah of Karventnagar*, A.I.R. 1929 Mad. 404; *Lakshmanan Chetty* v. *Palaniappa Chetty*, A.I.R. 1928 Mad. 1052 ; *The Secretary of State* v. *Bhanumurthy*, (1913) 24 M.L.J. 538 : 17 I.C. 373.

A.A.O. No. 481 *of* 1972.

Appeal against the order of the Court of the Principal Subordinate Judge, Ramanathapuram at Madurai dated 7th July, 1972 and made in E. P. No. 2 of 1972 in O. S. No. 16 of 1957.

C.M.P. No. 12550 *of* 1972.

Petition praying that in the circumstances stated therein and in the affidavit filed with C. M.P. No. 12549 of 1972 on the file of the High Court, the High Court will be pleased to order reception of the Inam Fair Register Extract filed herewith.

R. Alagar, for Appellant.

R. Kesava Iyengar for *V. T. Gopalan* and *Radha Gopalan*, for Respondent.

The Court made the following

ORDER.—The third respondent in the Court below is the appellant. Srivilliputhur Manavala Mahamuni Mutt is a religious institution controlled and supervised by the Jeer of Vanamamalai Mutt. At one time, a dispute arose between Matathipathi of Manavala Mahamuni Mutt (hereinafter referred to as the Matathipathi) and the Jeer of Vanamamalai Mutt (hereinafter referred to as the Jeer) on the question whether the Matathipathi was subject to control of the Jeer. To establish his rights the Jeer filed a suit, O. S. No. 19 of 1951 on the file of the Subordinate Judge's Court, Ramanathapuram. The then Matathipathi resisted the suit and for the purpose of defending the action, he borrowed moneys from a third-party who is the decree-holder in these proceedings. The trial Court decreed the suit, but on appeal to this Court in A. S. No. 485 of 1955, the judgment of the trial Court was reversed and a decision was rendered in favour of the Matathipathi. Thereupon, the Jeer preferred Letters Patent Appeal No. 2 of 1960 and the Letters Patent Bench allowed the appeal and recognised the right of the Jeer to nominate the Matathipathi. The decree-holder who had lent moneys to the Matathipathi to contest the litigation started by the Jeer, filed a suit, O. S. No. 16 of 1957 to recover from the Matathipathi the sums of money advanced by him. The suit was decreed *ex parte* on 2nd August, 1957. During the pendency of A.S. No. 485 of 1955 the Matathipathi who originally borrowed moneys from the petitioner-decree-holder died and thereupon the Executive Officer of Sri Nachiar Devasthanam was appointed a fit person to look after the affairs of the Manavala Mahamuni Mutt. After duly taking charge of the

affairs of the Mutt, the fit person filed a suit, O.S. No. 52 of 1962 to restrain the decree-holder in O. S. No. 16 of 1957 from executing the decree against the Mutt on the ground that the promissory notes on the strength of which the decree-holder-petitioner had obtained a decree in O. S. No. 16 of 1957 were not supported by consideration and; secondly, summons in the said suit had not been duly served on the institution. The trial Court agreed with the contentions of the fit person and the suit was decreed on 31st March, 1964 and a permanent injunction was granted in favour of the fit person. The decree-holder filed A. S. No. 365 of 1964 to this Court and the appeal was duly allowed. The resultant position was that the decree passed in favour of the decree-holder in O. S. No. 16 of 1957 became final.

2. After the disposal of A. S. No. 365 of 1964 which, as stated above left intact the decree awarded in favour of the decree-holder in O. S. No. 16 of 1957, the decree-holder filed the present execution petition E.P. No. 2 of 1972, so that it should be treated as a continuation of the prior execution petition E.P. No. 22 of 1959 so as to render the later execution petition within time and bring to sale the immovable properties of the Mutt for realisation of the amount decreed in his favour. It may be mentioned at this juncture that at one stage of the proceedings, the decree-holder had filed E. P. No. 22 of 1959, but the said execution petition was closed on 16th October, 1972 on account of the injunction granted in favour of the fit person in O. S. No. 52 of 1962. The injunction granted in the said suit was in force from 16th October, 1962 to 28th April, 1971 on which date this Court allowed A. S. No. 365 of 1964 and dismissed O. S. No. 52 of 1962.

3. The Jeer who contested the execution petition raised two objections, *viz.*: (1) that the properties of the Mutt are not liable to be proceeded against as the loans which culminated into a decree in O. S. No. 16 of 1957 were incurred by the Matathipathi in his individual capacity and not in exercise of office as Matathipathi of the Mutt; and (2) that E.P. No. 2 of 1972 cannot be tacked on to E. P. No. 22 of 1959 for limitation purposes. The learned Subordinate Judge of Ramanathapuram who enquired into the petition overruled both the objections of the Jeer and ordered execution. With regard to the first contention, he held the decree passed in O. S. No. 16 of 1957 did not disclose that the Matathipathi had incurred the loans in his individual capacity and as such, it was not possible for the executing Court to go behind the decree and make a probe to find out if the decree had been validly passed against the Mutt. On the second ground of defence raised by the Jeer, the learned Subordinate Judge held that E. P. No. 22 of 1959 had been closed only for statistical purposes on account of the temporary injunction granted in O. S. No. 52 of 1962 and such closing cannot be treated as a final disposal of the execution petitioner. For reaching this conclusion, the learned Subordinate Judge placed reliance upon the decision of this Court in *Muthu Veeranna* v. *Muthu Venkatarama*[1], which holds that "if an execution petition is struck off, lodged, recorded or closed, while yet the reliefs prayed for, or some of them, remain undisposed without being covered by final orders either granting or refusing those reliefs, then the petition will continue to be on the file of the Court despite its being struck off, lodged, recorded or closed". The learned Subordinate Judge, also accepted the decree-holder's contention that during the period 16th October, 1962 to 28th April, 1971 the decree-holder was effectively injuncted from executing his decree and consequently, he is entitled to invoke section 15 of the Limitation Act to exclude such period in computing the time within which the execution petition should be filed. Here again, the learned Subordinate Judge invoked to his aid the decision of the Supreme Court in *Prem Lata Agarwal* v. *Lakshman Prasad Gupta*[2] for taking out of consideration the period during which the order of injunction passed against the decree-holder was in force. A third objection was also feebly raised by the Jeer before the lower Court against the maintainability of the execution petition on the ground that the attachment effected

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1. (1951) 1 M.L.J. 196: A.I.R. 1951 Mad. 711.
2. (1971) 2 M.L.J. (S.C.) 1: (1971) 2 S.C.J. 55: (1971) 2 An.W.R. (S.C.) 1: (1971) 1 S.C.R. 364: A.I.R. 1970 S.C. 1525.

in E.P. No. 22 of 1959 ceased to be effective with the closing of the petition and consequently, the decree-holder was not entitled to bring the properties to sale without fresh attachment. This hesitant contention was also rejected by the lower Court on the ground that since E.P. No. 22 of 1959 had only been closed for statistical purposes and had not been effectively disposed of on merits, the attachment effected in the said petition cannot be deemed to have been raised on 16th October, 1962 when E.P. No. 22 of 1959 was closed. He therefore held that the attachment originally effected in E.P. No. 22 of 1959 would enure to the benefit of the decree-holder even in E.P. No. 2 of 1972. Having thus set aside all the objections raised by the Jeer, the learned Subordinate Judge ordered execution and called upon the decree-holder to file sale papers. It is in these circumstances, the Jeer has come forward with this appeal.

4. Mr. Alagar, learned Counsel for the appellant, advanced three arguments in the appeal to contend that the learned Subordinate Judge ought not to have allowed the decree-holder to proceed with the execution petition filed by him. The first argument of Mr. Alagar relates to the validity of the decree passed in favour of the decree-holder. An attempt was made by the learned Counsel to traverse once over again the objection raised by the Mutt in the earlier suit, O.S. No. 52 of 1962 that the decree obtained by the plaintiff in O.S. No. 16 of 1957 will not be binding on the Mutt. Such a plea is raised on the basis that the Matathipathi who incurred the debt had not borrowed the amount for and on behalf of the Mutt or in connection with the activities of the Mutt and as such, the liability created by the Matathipathi cannot be imposed on the Mutt or its properties. This contention of the appellant cannot really be sustained. Though the contention of the appellant that the debt which ultimately ripened into a decree had not been really incurred for any of the religious or charitable activities in which the Mutt is engaged, but was incurred by the former Matathipathi for asserting his rights in the suit filed by the Jeer, the fact, nevertheless, remains that a competent Court of law has passed a decree against the Mutt in O.S. No. 16 of 1957 and this decree has not been varied or modified till this date in a manner known to law. No doubt, an attempt was made by the fit person to nullify the decree by seeking for a declaration in O.S. No. 52 of 1962 that the decree obtained in O.S. No. 16 of 1957 should not be executed against the properties of the Mutt, but such attempt proved abortive by reason of the decision of this Court in A.S. No. 365 of 1964. Having regard to the settled state of affairs, so far as the validity of the decree in O.S. No. 16 of 1957 is concerned, the appellant is not entitled to ask the executing Court to go behind the decree and assess once again the right of the decree-holder to proceed against the Mutt in execution of the decree granted in his favour in O.S. No. 16 of 1957.

5. The second ground of objection taken by Mr. Alagar, is that inasmuch as E.P. No. 22 of 1959 was closed on 16th October, 1962 and the present petition, E.P. No. 2 of 1972 was filed long afterwards, the lower Court should have held that E.P. No. 2 of 1972 is barred by limitation. This contention is clearly devoid of any merit and, in my opinion, has been effectively answered by the learned Subordinate Judge with succinct reasons. It is common ground that E.P. No. 22 of 1959 was not disposed of on merits, but was merely closed for statistical purposes as the execution of the decree passed in O.S. No. 16 of 1957 had been temporarily injuncted by orders of Court in O.S. No. 52 of 1962. This Court has held in several instances that such closing of an execution petition for the purpose of record will not amount to a judicial disposal of the execution petition. It necessarily follows that the execution petition must be deemed to be in suspended animation and it is open to the decree-holder to again revive the execution proceedings by means of a suitable petition at the appropriate time. Admittedly, the decree-holder had been restrained, by means of an injunction in O.S. No. 52 of 1962 and A.S. No. 365 of 1964, from executing his decree and such restraint made on him remained in force till 28th April, 1971 when A.S. No. 365 of 1964 was disposed of. In these circumstances, the decree-holder is certainly entitled to claim the benefit afforded by section 15

of the Limitation Act, and exclude the period of stay for the purpose of limitation while pursuing his remedies in execution proceedings against the judgment-debtor. The law is well settled on this aspect of the matter and the Supreme Court has held in *Prem Lata Agarwal* v. *Lakshman Prasad Gupta*[1], that it is enacted in section 15 of the Limitation Act, 1908 that while computing the period of limitation prescribed for any suit or application for decree, execution of which had been stayed by injunction, the time of the continuance of the injunction shall be excluded. It is, therefore, futile for the appellant to contend that the period during which the operation of the decree obtained by the decree-holder was stayed should not be taken into consideration in deciding the question whether E.P. No. 2 of 1972 filed by the decree-holder is within time or not. The second objection raised by the learned Counsel for the appellant should, therefore, necessarily fail.

6. We are now left with the third objection raised by the appellant to assail the order of the lower Court. This objection has been raised in the following manner in the memorandum of appeal :

> " The lower Court failed to see that the lands which have been attached and ordered to be sold are inam lands granted for the support of the Mutt under Inam Title Deed 518 and the shops, which also have been attached and ordered to be sold form part of the Matam building and are inalienable and hence cannot be sold in execution even if the debt is binding on the Mutt."

The contention of Mr. Alagar in support of this objection is that the properties of the Mutt which are sought to be proceeded against in execution are inam grants and as such they are inalienable properties and cannot be sold under any circumstances and such a bar would even extend to execution proceedings taken in a Court of law to execute a decree passed against the Mutt. In support of his contention Mr. Alagar placed reliance on section 41 of the Madras Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as the Act) and the decisions rendered by this Court in *Anjaneyalu* v. *Sri Venugopala Rice Mill, Limited*[1] and *Sundararajulu Naidu* v. *Pappiah Naidu*[2]. Section 41 of the Act (relevant portions alone extracted) reads as follows :

> " *Section* 41 :
>
> (1) Any exchange, gift, sale or mortgage and any lease for a term exceeding five years of any inam granted for the support or maintenance of a religious institution or for the performance of a charity or service connected therewith or of any other religious charity and made, confirmed or recognised by the Government shall be null and void :
>
> Provided that any transaction of the nature aforesaid (not being a gift) may be sanctioned by the Government as being necessary or beneficial to the institution..............
>
> (2) (*a*) The Collector may, on his own motion, or on the application of the trustee of the religious institution or of the Commissioner or of any person having interest in the institution who has obtained the consent of such trustee or the Commissioner, by order, resume the whole or any part of any such inam, on one or more of the following grounds, namely :—
>
> (*i*) ....
>
> (*ii*) ....
>
> (*iii*) that the holder of such inam or part has failed to perform or make the necessary arrangements for performing, in accordance with the custom or usage of the institution, the charity or service for performing which the inam had been made, confirmed or recognised as aforesaid, or any part of the said charity or service, as the case may be .... "

Mr. Alagar's contention is that if the properties granted to the Mutt by Government under Inam Grants are allowed to be sold in execution proceedings, the resultant effect would be that the Mutt will be

1. (1971) 2 S.C.J. 55 : (1971) 1 S.C.R. 364.

1. 42 M.L.J. 477: 70 I.C. 466 : (1922) I.L.R. 45 Mad. 620 A.I.R. 1922 Mad. 197. (F.B.):
2. (1938) 1 M.L.J. 686 : I.L.R. (1938) Mad. 767 182 I.C. 587 ; A.I.R. 1938 Mad. 623.

unable to perform the charity or service for performing which the inam had been made, confirmed or recognised and consequently, the Government may resume the grant and such resumption will prejudicially affect the interests of the Mutt. In order to prove that the properties which are now attached and brought to sale are lands granted in inam settlement by the Government, the appellant has filed C.M.P. No. 12550 of 1972 for reception of the Inam Fair Register Extract as additional evidence. In the said Inam Fair Register Extract, it is stated that the land described therein has been granted as inam "for the support of Manavala Mahamuni Matam at Srivilliputhur now kept up". The register also makes mention that the land is a whole ardhamanniyam village held for the support of the Manavala Mahamuni Matam. Yet another entry in the Remarks-column is to the effect that at the Matam daily pooja is maintained to Manavala Mahamuniswami and Brahmins are fed on important days and the whole of the proceeds of the inam is appropriated for charitable purposes. From the entries contained in the Inam Fair Register Extract, it is clearly seen that the lands which are attached and brought for sale by the decree-holder are inam lands and they have been granted to the Mutt so that the income therefrom may be utilised to perform daily poojas in the Matam and for feeding Brahmins on important days. Such being the case, it calls for determination as to whether the lands can be sold by the Matathipathi of his own volition or allowed to be brought to sale by a third-party to realise amounts due from the Matam. The appellant's contention is that inam lands granted to a religious or charitable institution for specific purposes connected with the objective of the institution cannot be sold either by private treaty or by due process of law. In support of such a contention, the appellant places reliance on two decisions of this Court as referred to above (1) and (2).

7. *Anjaneyalu* v. *Sri Venugopala Rice Mills Limited*[1] is a case where a respondent-decree-holder attached certain lands in execution of a decree and the judgment-debtor raised an objection on the ground that the lands attached were burdened with swasthivachakam service and therefore inalienable. The Full Bench of this Court which decided the case held that the sale of such property is opposed to the nature of the interest effected and was also contrary to public policy. It further held that if the property were sold the purchaser could get no title of any value, for, at any moment the property might revert to the zamindar or the Government as the case may be when the inamdar ceased to render such service. In the later case, *Sundararajulu* v. *Papiah Naidu*[1], the question that arose for consideration was whether it was competent for the Government to make a heritable grant providing for a succession of limited interests, each grantee taking the estate for life and whether, by virtue of the limited nature of the grant, the property fell within the Exception to section 60 of the Code of Civil Procedure and was therefore not liable to be sold at the instance of the decree-holder. A difference of opinion arose between the two Judges who heard the appeal and consequently, the matter was referred to a third Judge for his opinion, Burn. J., held that the jaghir which was brought for sale fell within the terms of section 60, Civil Procedure Code and the jaghir was certainly saleable property over the profits of which the judgment-debtors had a disposing power which they may exercise for their own benefit. Abdur Rahman, J., held that under the terms of the sannad or in pursuance whereunder the jaghir was granted to the grantee and his heirs, they are only entitled to the right to enjoy the rents and profits derived from the jaghir during the time of their natural lives, but they had no power of disposal over the corpus of the property, that they cannot be held to have any power to deal with its income beyond the period of their natural lives and that therefore, the jaghir cannot be held to be saleable property belonging to the judgment-debtor or ever which or the profits of which he has a disposing power which he may exercise for his own benefit, as defined in section 60, Civil

1. (1922) I.L.R. 45 Mad. 620 : 42 M.L.J. 477. (F.B.).

1. (1938) 1 M.L.J. 686 : I.L.R. (1938) Mad. 767.

Procedure Code. Venkataramana Rao, J., the third Judge, to whom the matter was referred for his opinion, concurred with the view of Abdur Rahman, J. and held that it was competent for the Crown to make a heritable grant providing for a succession of limited interests each grantee taking the estate for life, that such grantees were only entitled to enjoy the rents and profits from the jaghir during their lives, that such rights alone, and not the jaghir itself, are attachable and saleable and consequently, the appropriate order that was to be passed in the case was to direct the appointment of a receiver to be in possession and management of the property who will collect the rents and profits thereof and pay the share of the net profits of the judgment-debtors in satisfaction of the decree.

8. Mr. Kesava Iyengar, learned Counsel for the decree-holder, vehemently opposes the contention of the appellant that the lands of the Mutt, being lands granted under inam, are not liable to be attached and brought to sale and advanced several arguments to sustain the order of the lower Court. It was firstly contended by Mr. Kesava Iyengar, that the objection raised to the inam lands of the Mutt being brought to sale is a new ground of objection and was not raised before the executing Court. It was therefore argued that the appellant cannot be permitted to raise this new ground of objection in the appellate stage of the case. To buttress this argument, Mr. Kesava Iyengar placed reliance upon *Govindoss* v. *Rajah of Karvetnagar*[1], where it was held that a party, who has objections to a proceeding before the Court, must put them forward at the earliest opportunity and must put all of them forward and not keep back any of them for subsequent presentation. It is, no doubt, true that the objection, as now projected by the appellant, was not raised before the executing Court. But, on that score, I do not think that the appellant can be denied opportunity to raise the contention, since it is a mixed question of law and fact. The second argument of Mr. Kesava Iyengar is that the properties which were brought to sale were attached even in E.P. No. 22 of 1959 and, since the appellant did not raise any objection to the attachment of the lands on the ground that they were inam lands and hence inalienable in character, the appellant was estopped from agitating the question that the lands were not liable for attachment and sale. To contend that though E.P. No. 22 of 1959 was closed, nevertheless the attachment effected in that petition must be deemed to be subsisting, the learned Counsel placed reliance on *Lakshmanan Chetty* v. *Palaniappa Chetty*[1] where it was held that when once execution is ordered, the subsequent dismissal of the execution petition either for want of prosecution or owing to inability of the process of the Court to reach the judgment-debtor or his property does not imply that the earlier orders passed on that application ceased to have effect: I am afraid that the proposition of law relied on by Mr. Kesava Iyengar cannot have application to the facts of this case. Admittedly, the fit person who was in charge of the Mutt had not only repudiated the liability of the Mutt to satisfy the decree obtained by the decree-holder, but had gone a step further and filed a suit, O.S. No. 52 of 1962, to restrain the decree-holder from executing the decree in O.S. No. 16 of 1957 against the Mutt and its properties. In such circumstances, it is difficult to accept the contention advanced on behalf of the decree-holder that the Mutt or its representative had not raised any objection to the attachment effected in E.P. No. 22 of 1959 regarding the inam character of the lands of the Mutt and therefore it must be concluded that the Mutt had waived such an objection at the appropriate stage and, in any event, it was estopped from questioning the validity of the attachment after having meekly suffered such attachment in E.P. No. 22 of 1959. The third ground relied on by the decree-holder to meet the case of the appellant is that the plea of the appellant had already been considered by the Court in A.S. No. 365 of 1964 and therefore, the appellant is barred by *res judicata* from raising the plea once over again. The judgment in A.S. No. 365 of 1964 does not, however, provide any basis for such a contention being advanced by Mr. Kesava Iyengar. What was principally

1. A.I.R. 1929 Mad. 404.

1. A.I.R. 1928 Mad. 1052.

contended in O.S. No. 52 of 1962 and in A.S. No. 365 of 1964 was that the Matathipathi who had incurred the debt from the decree-holder had incurred the liability for personal causes and as such, the Mutt or its properties cannot be called upon to satisfy the decree. The question as to whether the inam properties of the Mutt are liable to be attached and brought to sale in execution of a decree obtained against the Matathipathi did not directly come up for consideration in those proceedings. There is, therefore, no force in the contention that the decision in A.S. No. 365 of 1964 will operate as *res judicata* and debar the appellant from raising the plea that the inam lands of the Mutt are inalienable and cannot be brought for sale. The last argument of Mr. Kesava Iyengar is that, in any event, there is a marked difference between inam grants in favour of individuals burdened with a service and inam grants in favour of institutions for religious and charitable purposes, and the restrictions impressed upon the grant to a grantee of the former category cannot be held to exist in so far as the grants of the latter category are concerned. So far as this contention is concerned, I am of opinion that Mr. Kesava Iyengar's objection is well-founded.

9. As I have already stated, the appellant has filed C.M.P. No. 12550 of 1972 for reception of the Inam Fair Register extract as additional evidence. As the appellant places reliance on the entries contained therein and as I am of opinion that the entries in the Inam Fair Register have to be necessarily looked into for assessing the case of the appellant, the petition, C.M.P. No. 12550 of 1972 is allowed and the Inam Fair Register extract is received and marked on the side of the appellant, as Exhibit R-1. In Exhibit R-1, under column 10, the grant is shown as a permanent one. It is therefore not a restricted or a conditional grant. The decisions relied on by the learned Counsel for the appellant can have no application to the facts of this case. *Anajneyalu* v. *Sri Venugopala Rice Mills Limited*[1] was a case where the grant was to an individual and the grant was subjected to the condition that the grantee and his successors-in-interest should do swasthivachakam service in the temple and they would be entitled to enjoy the inam so long as they did the service. Even when the Inam Commissioner confirmed the grant, he incorporated the stipulation that the grant was to be continued so long as the service was performed. It was in those circumstances, the Full Bench held that the grant being burdened with service, was of a restricted nature and therefore the lands granted under the inam were not alienable. In so far as *Sundararajulu Naidu* v. *Pappiah Naidu*[1], is concerned, the inam besides being an unenfranchised one, was also a heritable one, since the grantor intended the grant to descend to the heirs of the grantee. It was on account of that, a clause containing prohibition against alienation was inserted in the grant. No such restrictions are seen in so far as the inam grant of lands in the instant case is concerned. Further more, it is seen that the grant has been enfranchised and a jodi rent has been fixed for the lands. There is no evidence as to when exactly the inam was granted and by whom it was granted. If the grant had been made by the proprietor of an estate, even the Government has no right to resume an inam subsequent to the permanent settlement. Vide : *The Secretary of State* v. *Bhanumurthy*[2]. In the Inam Fair Register extract, Exhibit R-1, under the column " Decision of the Inam Commissioner or his Assistants ", the following endorsement is found : " Confirmed on present tenure subject to the jodi of Rs. 220. The tank will in future be repaired by the inamdar himself". It is apposite to note here that in another portion of Exhibit R-1, the following endorsement is found : " The tank of the village is in good order. The cost of the tank repairs has been borne by the Government and the Ardhamayamdar (Ardhanari Gounder) in equal shares." Thus it is seen that the Inam Commissioner has not only confirmed the grant of the whole ardhamanyam village in favour of the Mutt, but has subjected it to a jodi of Rs. 220 and has further directed the Mutt itself, *viz.*, the inamdar, to meet the

1. I.L.R. 45 Mad. 620 : 42 M.L.J. 477 (F.B.)

1. I.L.R. (1938) Mad. 767 : (1938) 1 M.L.J. 686.
2. (1913) 24 M.L.J. 538 : 17 I.C. 373.

expenses of the tank in future. The following passage occurring in page 53 of Vedantachari's Estates Land Act (Vol. I) makes it clear that if the word "confirmed" appears in the Inam Fair Register, as against inam, the presumption would be that the grant of the inam was made prior to enfranchisement :

> "The word 'confirmed' appears to be used to indicate inams, which are confirmed by the Inam Commissioner, prior to enfranchisement."

With reference to enfranchisement of inams, this is what is found at page 53 of the abovesaid book :

> "Subsequently in 1859, what are known as the Inam Rules were framed for investigating into the titles of various inamdars and for enfranchisement of inams, by releasing the reversionary rights of the Government, and granting free-hold title deeds to the inamdars to a fixed quit rent. An Inam Commissioner was appointed for the purpose."

After dealing with the various modes of proof regarding valid title for an inam, the author has stated as follows :

> "Where proof of title is adduced as above, the inam is 'confirmed' and then enfranchised by the reversionary rights of the Government being surrendered and a free-hold title being issued. All enfranchised inams are therefore inams which are 'confirmed'. Wherever inams are not enfranchised, it has to be shown that they were at least 'recognised' in the manner already stated. 'Recognised' inams appear to be those which are not expressly settled or enfranchised by the 'Government' but otherwise allowed to be continued, whereas 'confirmed' inams are those which are expressly 'settled' under the Inam Rules or otherwise".

In such circumstances, the entries in the Inam Fair Register extract themselves go to show that the inam was not only confirmed, but enfranchised by the Inam Commissioner. As I have already stated, there is no stipulation anywhere that the inam grant will suffer resumption if the grantee failed to perform any of the conditions imposed on it. Undoubtedly, if the lands of the Mutt are acquired, the Mutt will be entitled to compensation in respect of those lands. It therefore necessarily follows that the lands which have been attached by the decree-holder are the absolute properties of the Mutt and therefore liable to be attached and brought for sale by the decree-holder. Even section 41 of the Hindu Religious and Charitable Endowments Act cannot be of any avail to the appellant. Section 41 prohibits a voluntary transfer of inam land by exchange, gift, sale or mortgage and any lease for a term exceeding five years. Even here, any of the abovementioned acts can be entered into by or on behalf of the institution, except a transaction amounting to gift, with the sanction of the Government. It is therefore clear that it is not as if an exchange, sale, mortgage, lease etc., can never be entered into by a religious or charitable institution in respect of its properties obtained by inam grant. In any event, these restrictions will not apply to the case of a forced sale as in the case of the property of a religious or charitable institution being brought to sale in Court-auction by a decree-holder. Hence the third ground of objection raised by the appellant must also fail.

10. In the result, the appeal fails and is dismissed, but there will be no order as to costs.

Exhibit marked in High Court.

Exhibit R-1 —Inam Fair Register Extract, dated 19th January, 1951.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

B. Narayanan Chettiar .. *Appellant**

v.

S. Alagar Thevar .. *Respondent.*

Madras City Tenants' Protection Act (III of 1922), section 9—Ejectment—Petition under section 9—Compensation ordered to be deposited—Landlord failing to execute conveyance—Tenant filing execution petition—Whether petition necessary—Scope.

Neither an interlocutory application nor an execution petition is required by the Madras City Tenants' Protection Act to be filed by the tenant. It is the duty of the Court after receiving the original petition filed by the tenant, to keep that petition pending till it goes through all the stages contemplated in section 9 of the Act and final orders are passed either directing the conveyance by the landlord to the tenant and directing the tenant to put the landlord into possession of the remaining extent, or in case, the tenant fails to deposit the amount within the prescribed period, dismissing the application itself. [*Para.* 5.]

Appeal against the order of the Court of the Subordinate Judge (First Additional) Madurai, dated 7th July, 1972 and made in C.M.A. No. 48 of 1972 (in E.P. No. 724 of 1971 in O.P. No. 92 of 1964 District Munsif Court, Madurai Town).

Manicka K. Ramalingam, for Appellant.

R. Ramaswami, for Respondent.

The Court made the following

ORDER.—This appeal is directed against the order of the First Additional Subordinate Judge, Madurai dismissing the appellant's appeal against the order of the Principal District Munsif, Madurai Town in Execution Petition No. 72 of 1971 in Original Petition No. 92 of 1964. In O.S. No. 481 of 1964 on the file of the Court of the District Munsif, Madurai Town, the appellant sued for ejectment of the respondent, his tenant. The tenant filed O.P. No. 92 of 1964 under section 9 of the Madras City Tenants' Protection Act, which despite contest, was allowed. Both the parties preferred appeals to the District Court, Madurai, which in modification of the order passed by the District Munsif, directed the tenant to pay the landlord a sum of Rs. 5006-25 towards compensation for the property in question within three months from the date of that order. The appellate Court further directed that on the amount being paid or deposited into Court, O.P. No. 92 of 1964 shall stand allowed and in default of such payment or deposit the said O.P. shall stand dismissed. In pursuance of that order, the tenant deposited the amount into Court but the landlord failed to execute a conveyance in favour of the tenant, whereupon the tenant filed Execution Petition No. 724 of 1971 on the file of the Court of the District Munsif, Madurai Town for a direction to the landlord to execute a conveyance in his favour in accordance with the order of the appellate Court. This execution petition was opposed by the landlord on the ground that no execution petition was maintainable inasmuch as the tenant had not obtained any final decretal order as contemplated under section 9 (3) of the Madras City Tenants' Protection Act. Another ground urged was that the tenant was liable to pay Rs. 750-00 on account of arrears of rent after making the necessary adjustments and that he was not entitled to ask for a conveyance without payment of that amount. Both these contentions were over-ruled by the District Munsif who approved the draft sale-deed produced by the tenant and directed him to produce a fair sale-deed. Against this order, the landlord preferred C.M.A. No. 48 of 1972 on the file of the Court of First Additional Subordinate Judge, Madurai. The sole objection raised in appeal was that the execution petition was not maintainable in law. The appellate Court held that the execution petition was maintainable and dismissed the appeal without costs. It is against this order that the present appeal has been filed.

2. Under section 9 (1) (*a*) of the Madras City Tenants' Protection Act, any tenant who is entitled to compensation under

* A.A.A.O. No. 120 of 1972. 22nd March, 1974.

section 3 and against whom a suit in ejectment has been instituted may within the period prescribed apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court, the whole or part of, the extent of the land specified in the application.

3. Under section 9 (1) (*b*) on such application, the Court shall first decide the minimum extent of the land, which may be necessary for the convenient enjoyment by the tenant and then proceed to fix the price of the minimum extent of the land and then order that within a period to be determined by the Court the tenant shall pay into Court or otherwise as directed the price so fixed in one or more instalments with or without interest.

4. Under section 9 (2), in default of payment by the tenant of any one instalment, the application shall stand dismissed. Under clause (*a*) of sub-section (3) of section 9 on payment of the price fixed under clause (*b*) of sub-section (1), the Court shall pass an order directing the conveyance by the landlord to the tenant of the extent of land for which the said price was fixed. The Court shall by the same order direct the tenant to put the landlord into possession of the remaining extent of the land, if any. Under section 9 (3) (*b*), on the order referred to in clause (*a*) being made the suit or proceeding shall stand dismissed and any decree or order in ejectment that might have been passed therein but which has not been executed shall be vacated.

5. It is clear from a perusal of the several clauses in section 9, that only one application by the tenant is contemplated. It is not as if he has to file a separate application at every stage. Admittedly before the execution petition was filed by the tenant an order had been passed fixing the minimum extent of land necessary for the convenient enjoyment by the tenant and fixing also the price of the minimum extent of the land decided as aforesaid. Further the Court has also by its order directed the tenant to deposit into Court the price fixed by it. It is admitted that a sum of Rs. 5006-25 was fixed by the Court, which has been deposited by the tenant into Court on 3rd November, 1969. In fact, this amount was fixed by the appellate Court in modification of the amount fixed by the Court of first instance. After this modification, the trial Court ought to have called O.P. No. 92 of 1964 on or after the date fixed for the deposit of the amount by the tenant. Because it failed to do so the tenant filed an execution petition on the basis that he could execute the order already passed by the Court. This gave the landlord a handle to raise the objection that no execution petition was maintainable. It was also contended that only by way of interlocutory application the tenant should have prayed for further orders from Court. I am clear in my mind that neither an interlocutory application nor an execution petition is required by the statute to be filed by the tenant. It is the duty of the Court, after receiving the original petition filed by the tenant, to keep that petition pending till it goes through all the stages contemplated in section 9 and final orders are passed either directing the conveyance by the landlord to the tenant and directing the tenant to put the landlord into possession of the remaining extent, or in case, the tenant fails to deposit the amount within the prescribed period, dismissing the application itself. The execution petition filed by the tenant must be regarded as a reminder to the Court to take up the Original Petition and proceed with it till the culmination of the proceedings contemplated in section 9 (3) (*a*). It is not as if any executable order has been passed by the Court when it directed the tenant to deposit the amount. It was merely a direction which had to be followed by further orders, either of dismissal in case of default or of direction to the landlord to execute a conveyance in case the deposit was made.

6. I, therefore, hold that the objection raised by the landlord is entirely misconceived and both the Courts below have passed orders on the erroneous basis that an execution petition was necessary. I direct that the Execution Petition filed by the tenant be treated merely as a reminder to the Court to take up O.P. No. 92 of 1964 at the stage at which it was left, and as a prayer to proceed with it in accordance with the provisions embodied

in section 9 of the Madras City Tenants' Protection Act, 1921.

7. The result is that the appeal will stand dismissed, but, under the circumstances, without costs.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ramaswami, J.*

A. N. Parasuram by his duly constituted agent A. P. Narayanan .. *Appellant**

v.

C. S. Rajavelan and others. .. *Respondents.*

(A) *Madras City Municipal Corporation Act (IV of 1919), sections 99 to 104 and rule 3-A of Part 1-A of Schedule IV—Rule 3-A—Word "or", if to be understood as "and"—Person liable to pay tax—Definition of 'occupier'—Revision of assessment—Notice to occupier—If necessary.*

(B) *Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 6—Object of.*

It is well-settled, that in order to give effect to a legislative intendment it would be permissible for the Court to interpret and understand the word 'or' as meaning 'and', if the language warrants such interpretation. [*Para.* 6.]

Though tax is levied on the building or lands under section 99 of the Madras City Municipal Corporation Act the liability to pay the tax is fixed under section 104 on the owner of the assessed premises. On a *prima facie* reading, rule 3-A of Part 1-A of Schedule IV to the Act even authorises the Commissioner to issue notice to the occupier alone to revise the assessment. But having regard to the provisions of the Act and to the definition, it would have to be understood as authorising the Commissioner to issue special notice to the occupier only under special circumstances. [*Para.* 9.]

There may be cases where the owner himself may not be available and as the assessment itself has to be made during the half year in respect of which the assessment relates and since it may not be possible for the Corporation to issue notice to the owner who may be in a different place, the Corporation is authorised to issue notice to the occupier under rule 3-A and make the assessment. The owner is not without remedy in such cases and he can file an application for revision on the ground that the occupier to whom notice has been issued had not placed all the materials before the Corporation for coming to the proper conclusion. [*Para.* 11.]

The definition of "occupier" is an inclusive definition. Any person who is in physical occupation of the property, though not a tenant, would also be an occupier. The latter portion of the definition seems to suggest that even a trespasser who would be liable to pay damages to the owner, is an occupier within the meaning of the definition. Much more so, the transferee of the legal title would be an "occupier" within the meaning of rule 3-A. [*Para.* 9.]

Further there is no obligation on an owner to intimate to the Corporation about any change in the tenancy. The obligation is only to intimate if there is any change in the rent payable in respect of the premises, for, that alone will have a bearing on the assessment of the property. The Corporation, therefore, has no means of knowing who the tenant is to whom the notice will have to be issued. [*Para.* 10.]

The object of section 6 of the Madras Buildings (Lease and Rent Control) Act is to make the rent payable have a bearing on the tax paid in respect of the property. The provisions of section 6 could not in any way control the provisions of the Madras City Municipal Corporation Act in respect of the assessment and levy of taxes. Section 6 of the Act is not made to have any overriding effect over the provisions of the Madras City Municipal Corporation Act. [*Para.* 13.]

Having regard to the scheme of the Madras City Municipal Corporation Act, rule 3-A could not be understood as

*S.A. No. 1150 of 1971. *4th April, 1974.*

making it obligatory on the Corporation to issue a notice to the occupier also in addition to the notice to the owner and the word 'or' occurring in that rule could not be understood as meaning 'and'. [*Para.* 12.]

Appeal against the decree of the City Civil Court (First Additional City Civil Judge), Madras in Appeal Suit No. 104 of 1969, preferred against the decree of the City Civil Court, (Fourth Assistant Judge) Madras in Original Suit No. 1043 of 1965.

T. Aravamudha Ayyangar and *A. P. Venkatachalam*, for Appellant.

B. Lakshminarayana Reddy and *V. Kathirvelu*, for Respondents.

The Court delivered the following

JUDGMENT:—The appellant is the unsuccessful plaintiff. Respondents 1 to 3 are the owners of Premises No. 24, Halls Road, Madras, of which the appellant is the tenant on a monthly rental of Rs. 375.

2. On 1st September, 1960 the fourth respondent, Corporation of Madras, issued a notice to the owners, under rule 3-A of Part I-A of Schedule IV of the Madras City Municipal Corporation Act, 1919, proposing to amend, in the books of assessment, the annual valuation of the property as Rs. 9,555, and the tax payable thereon as Rs. 1,127-49, and library cess at Rs. 29-81 for the first half-year 1960-61, and calling upon the owners to state their objections thereto, if any, on or before 3 P.M. on 8th September, 1960. By letter, dated 8th September, 1960 respondents 1 to 3 filed their objections to the proposed amendment of the property tax assessment books by revising the annual valuation, contending that the rent for the premises continued to be the same and that they had not caused any improvement or addition to be made to the premises to warrant the increase. The objection was overruled ; but all the same, the value was reduced to Rs. 8,190 and the tax payable thereon was fixed at Rs. 966-42 and the library cess at Rs. 25-59. Since the revision of assessment occurred in the middle of two general revisions, the Revenue Officer of the Corporation issued a special notice as required under Rule 3-A of Part I-A of Schedule IV of the Madras City Municipal Corporation Act. This notice also informed the owners that they could file a petition for revising the assessment to the Commissioner within fifteen days of the service thereof. This special notice was issued on 12th September, 1960 and served on respondents 1 to 3, the owners. The owners thereupon filed a revision petition to the Commissioner. The Commissioner reduced the assessment by fixing the annual value at Rs. 6,006 and the half-yearly tax payable at Rs. 708-70 and library cess at Rs. 18-75. The owners did not object to this revision, by taking, further proceedings.

3. But the plaintiff filed the suit, out of which this second appeal arises, challenging the assessment on the ground that the revision of assessment was made collusively and without notice to him and that he was not bound by the revised assessment. His contention was that under section 6 of the Madras Buildings (Lease and Rent Control) Act he would be liable, as a tenant, to pay any increase in the tax to the landlords and that therefore he is the person vitally interested in the revision of assessment and of tax. He also contended that at the time when the revision was sought to be made, section 30 of the Madras Buildings (Lease and Rent Control) Act exempted a non-residential building, the rental value of which, as entered in the property tax assessment books of the Corporation, exceeded Rs. 400 per mensem, and the attempt of the landlords was to revise the assessment by increasing the annual value in order to take the premises out of the purview of the Madras Buildings (Lease and Rent Control) Act. He further contended that on a construction of Rule 3-A of Part I-A of Schedule IV of the Madras City Municipal Corporation Act itself, a notice is required to be given to the tenant, and that since, admittedly, no notice was issued to the tenant— occupier, the revision of assessment was not binding on him.

4. The plea of collusion was found against by both the Courts below; and I am not impressed with the argument of the learned Counsel, for the appellant that the revision of assessment was brought about collusively by the Corporation and

the owners. For one thing, a statutory authority like the Corporation could not be easily inferred to have colluded with the owners of a premises. For another thing, the owners would normally be expected not to ask for an increase in the assessment, because that would be a permanent valuation which they could not, at any stage, get reduced even after evicting the tenant. In any case, as the finding on the question of collusion is one of fact, I am unable to interfere with the concurrent finding of the Courts below.

5. The next question, therefore, that arises for consideration in this second appeal is as to whether, on a proper interpretation of rule 3-A aforesaid, the plaintiff would be entitled to a special notice before the revising of the assessment and whether the revision of assessment made without such a notice to him was invalid.

6. Rule 3-A of Part I-A of Schedule IV of the Madras City Municipal Corporation Act reads as follows :—

> "In every case in which between one general revision and another the Commissioner assesses any property for the first time or increases the assessment on any property otherwise than in consequence of a general enhancement of the rate at which the property-tax is leviable, the Commissioner shall intimate by a special notice to the owner or occupier of such property that a petition for revising the assessment will be considered if it reaches the municipal office within thirty days from the date of service of such notice in the case of Government, a railway administration or a company and within fifteen days from the said date in other cases."

The argument of the learned Counsel for the appellant is that the rule requires the issue of a special notice to the owner or occupier and that in the context of the rule and the relevant provisions of the Act, the word 'or' would have to be understood as 'and' so as to make a special notice necessarily to be issued both to the owner and the occupier. There cannot be any dispute, and it is well-settled, that in order to give effect to a legislative intendment and if the language warrants such an interpretation, it would be permissible for the Court to interpret and understand the word 'or' as meaning 'and'. The only question, therefore, is whether the scheme of the Act or the relevant assessment proceeding anyway warrants such an interpretation.

7. Section 99 of the Madras City Municipal Corporation Act authorises the Council to levy property tax on all buildings and lands within the City, save those exempted under the Act, by a resolution. Section 100 deals with the method of assessment and provides that every building shall be assessed together with its site and other adjacent premises occupied as appurtenances thereto unless the owner of the building is a different person from the owner of such site or premises. The next relevant sections to be noticed are sections 103 and 104. Section 103 makes the property tax a first charge upon the building or the lands and upon the movable property found therein and belonging to the person liable to such tax. Section 104 deals with the person liable to pay the tax and when the tax is payable. It states —

> "The property tax shall be levied every half-year, and shall, save as otherwise expressly provided in Schedule IV, be paid by the owner of the assessed premises within fifteen days after commencement of the half-year."

8. The learned Counsel for the fourth respondent, Corporation, contends that the primary liability to pay the tax is that of the owners, though the Commissioner is authorised under rule 29 of Part I-A of Schedule IV of the Madras City Municipal Corporation Act, in certain circumstances, to collect the tax from the occupier. Having regard to the scheme of the Act, the learned Counsel contends that the word 'or' occurring in Rule 3-A in between "owner" and 'occupier' has to be understood distributively and that the Corporation was not bound to issue a notice both to the owner and the occupier. In this connection, he also referred me to the definitions of 'occupier' and 'owner' in the Act and pointed out that the definition of the word 'occupier' does not make the plaintiff-appellant liable to pay the taxes, nor does the

definition of 'owner' relieve respondents 1 to 3 of the obligation to pay the taxes under any circumstances. According to him, even the collection of tax under Rule 29 of Part 1-A of Schedule IV of the Madras City Municipal Corporation Act from the occupier is only on the account of the owner, but it is a tax to be paid by the owner, and not a tax to be paid by the occupier.

9. There is great force in this argument of the learned Counsel for the Corporation. As already seen, though tax is levied on the building or lands, under section 99, the liability to pay the tax is fixed under section 104 on the owner of the assessed premises. It is true that rule 3-A, on a *prima facie* reading, even authorises the Commissioner to issue notice to the "occupier" alone to revise the assessment. But having regard to the provisions of the Act and to the definition, it would have to be understood as authorising the Commissioner to issue special notice to the occupier without a notice to the owner only under special circumstances. In this connection it may be noted that the definition of 'occupier' is an inclusive definition, and not exhaustive. Cases may arise where there has been a transfer of the legal title by a registered document, by the owner in favour of another. In such a case it is obligatory on the owner to intimate about the transfer to the corporation so that the property tax register could be amended by showing the transferee as the owner of the property. But the owner may fail to do so, though the transferee had occupied the premises. In such cases, section 106-A provides that both the transferee and the transferor would be liable to pay the tax. What would be the position of the transferor so far as the corporation is concerned? The transferor continues to be the owner though the legal title had passed to the transferee. The transferee having got the legal title, and as a physical occupier of the property, would also be liable to pay the tax. One of those cases where the Commissioner could issue a special notice to the occupier would be, in my opinion, one where the transferee is in occupation. Since the definition of 'occupier' is an inclusive definition, any person who is in physical occupation of the property, though not a tenant would also be an occupier. In fact, the latter portion of the definition seems to suggest that even a trespasser who would be liable to pay damages to the owner, is an occupier within the meaning of the definition. Much more so, the transferee would be an 'occupier' within the meaning of rule 3-A.

10. There is also the further difficulty. There is no obligation on the owner to intimate to the Corporation about any change in the tenancy. The obligation is only to intimate if there is any change in the rent payable in respect of the premises, for, that alone will have a bearing on the assessment of the property. The Corporation, therefore, has no means of knowing who the tenant is to whom the notice will have to be issued.

11. There may be cases where the owner himself may not be available and as the assessment itself will have to be made during the half-year in respect of which the assessment relates, and since it may not be possible for the Corporation to issue notice to the owner who may be in a different place, the Corporation is authorised to issue notice to the occupier under rule 3-A and make the assessment. In all such cases where the assessment has been made after the issue of notice to the occupier, the owner is not without any remedy, because, he can also file an application for revising the assessment on the ground that the occupier to whom the notice had been given had not placed all the materials before the Corporation for coming to the proper conclusion.

12. As rightly pointed out by the learned Counsel for the Corporation, under what circumstances the Corporation would be justified in issuing a notice to the occupier alone without notice to the owner, would depend upon the circumstances of each case and would have to be decided with reference to the facts and circumstances of that particular case. Having regard to the scheme of the Act, rule 3-A could not be understood as making it obligatory on the Corporation to issue a notice to the occupier also in addition to the notice to the owner and the word 'or' occurring

in that section could not be understood as meaning 'and'.

13. The next argument of the learned Counsel for the appellant is that under section 6 of the Madras Buildings (Lease and Rent Control) Act, the difference between the original tax and the increased tax is to be paid by the tenant and since the liability to pay the increased tax ultimately falls on the tenant, the principles of natural justice require that he should have been heard before any such increase is made. He also contended that section 6 of the Madras Buildings (Lease and Rent Control) Act and rule 3-A of Part I-A of Schedule IV of the Madras City Municipal Corporation Act will have to be read together and considered, construed and interpreted harmoniously so as to make both these provisions workable, and, if so construed, it makes it obligatory on the Corporation to issue a notice to the occupier before revising the assessment I am unable to accept this contention of the learned Counsel. The Madras Buildings (Lease and Rent Control) Act, and in particular section 6, deals with the relationship of the landlord and the tenant and the fair rent payable by the tenant to the landlord. It has nothing to do with the tax to be levied on the property as such. Section 6 has to be read along with section 5 which deals with fixation of fair rent. The object of section 6 is to make the rent payable have a bearing on the tax paid in respect of the property. The tenant is made liable to pay the difference in the tax only in cases where the annual value is revised and not in cases where the rate of tax itself is revised by the Corporation. This clearly implies that section 6 could not contemplate any notice to the tenant before revising the annual value. Further, if the argument is to be accepted, even where a tenant is liable to pay the tax under a contract the Corporation will have to issue notice to the tenant though no statutory provision as in section 6 is on the statute book. The provisions of section 6 of the Madras Buildings (Lease and Rent Control) Act could not in any way control the provisions of the Madras City Municipal Corporation Act in respect of assessment and levy of taxes. It may also be pointed out that section 6 of the Madras Buildings (Lease and Rent Control) Act is not made to have any overriding effect over the provisions of the Madras City Municipal Corporation Act.

14. For the foregoing reasons, I am unable to agree with the learned Counsel for the appellant that he would be entitled to a notice by virtue of the provisions of section 6 of the Madras Buildings (Lease and Rent Control) Act.

15. The second appeal accordingly fails and it is dismissed. There will be no order as to costs. No leave.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. S. Venkataraman, J.*

Samiappan .. *Appellant* *

v.

Ramaswamy Gounder ..*Respondent.*

Civil Procedure Code (V of 1908), Order 41, rule 23—Suit for recovery of amount—Appeal—Remand for taking additional evidence—Whether valid.

Normally the mere fact that additional evidence is required would not at all justify an order of remand. [*Para.* 7.]

Cases referred to :—

Achammal v. *Krishna Naidu,* (1969) 1 M.L.J. 126 ; *Annamalai* v. *Narayanaswami Pillai,* (1971) 2 M.L.J. 330 : 84 L.W. 785 : A.I.R. 1972 Mad. 316 ; *Gora Chand* v. *Basantha Kumar,* (1911) 12 I.C. 684 : 15 Cal.L.J. 258 ; *Ram Dhani* v. *Nagar Mal,* A.I.R. 1941 Oudh 561.

Appeal against the order of the Court of the Subordinate Judge, Erode, dated 5th August, 1972 and made in A.S. No. 76 of 1971 (O.S. No. 1858 of 1969 District Munsif Court, Erode).

K. N. Balasubramaniam, for Appellant.

K. Doraiswami and *K. Vadivel,* for Respondent.

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* A.A.O. No. 402 of 1972. *26th April,* 1974.

The Court made the following

ORDER.—This is an appeal against an order of remand. The suit was instituted by the plaintiff on the allegations that on the morning of 19th November, 1967 he advanced a sum of Rs. 2,000 to the defendant, that later on the same day the defendant executed a "voucher" (Exhibit A-1) promising to pay the said sum with interest at the rate of twelve per cent. per annum, that he defaulted to pay and that therefore the plaintiff filed the suit for recovery of the amount, limiting his claim for interest to six and one-fourth per cent. per annum.

2. The defendant denied that he took any money from the plaintiff and he further denied that the signature in Exhibit A-1 was his. He contended that the suit had been falsely laid against him because of enmity which was itself due to the fact that the defendant helped a Harijan girl who filed a complaint against the plaintiff's son for alleged rape.

3. The plaintiff examined himself as P.W. 1, and the writer of Exhibit A-1 as P.W. 2, who stated that he wrote Exhibit A-1 at the instance of the plaintiff, but added that he did not know whether the defendant had signed in Exhibit A-1. The defendant examined himself as D.W. 1 and denied the borrowal and the execution of Exhibit A-1.

4. On the basis of the above evidence the trial Court dismissed the suit. The plaintiff preferred an appeal which was heard by the learned Subordinate Judge of Erode, as A.S. No. 76 of 1971. Long after the appeal was filed, the plaintiff filed I.A. No. 62 of 1972 for reception of additional evidence, namely, that Exhibit A-1 should be sent for examination by a handwriting expert, after taking a photostat copy of the signature of the defendant. The judgment of the learned Subordinate Judge, which is under appeal, shows that the only point which was argued by the learned Counsel for the plaintiff was that even in the trial Court a similar application had been made, but had been rejected. It was mainly on that ground that the learned Subordinate Judge set aside the judgment of the learned District Munsif and remanded the suit, permitting the plaintiff to take photostat copies of the signature of the defendant and sending Exhibit A-1 to the handwriting exeprt for comparison with the admitted signature of the defendant. Aggrieved by this order of remand, the defendant has preferred this appeal.

5. The main contention of Mr. K. N Balasubramaniam, learned Counsel for the appellant, is that, assuming that the learned Subordinate Judge was justified in allowing the reception of additional evidence, that was not a ground which would justify a remand, but the proper course for the learned Subordinate Judge was to take the Additional evidence himself or have it taken by the trial Court, but to keep the appeal itself on his file and dispose it, of. The learned Counsel cites the decisions of this Court in *Achammal* v. *Krishna Naidu*[1] and *Annamalai* v. *Narayanaswami Pillai*[2] in support of his contention.

6. Learned Counsel further submits that the petition was filed in the trial Court only at a late stage after the evidence was over and arguments were heard. This is mentioned in the counter which the defendant filed in I.A. No. 62 of 1972. The learned Counsel points out that in the grounds of appeal in A.S. No. 76 of 1971 no ground was taken that the learned District Munsif had improperly refused to receive the evidence which the plaintiff sought to adduce.

7. It is clear from the decisions cited by Mr. Balasubramaniam, which themselves proceed on earlier decisions of this Court, that, even assuming that the learned Subordinate Judge was right in allowing additional evidence to be taken, that would not justify an order or remand. Normally the mere fact that additional evidence is required would not at all justify an order of remand. This is such a case. Two decisions have been cited by the learned Subordinate Judge in support of his order of remand ; *Gora Chand* v. *Basanta Kumar*[3] and *Ram Dhani* v. *Nagar Mal*[4]. In *Gora Chand* v. *Basanta Kumar*[3] the power of remand was not confined, as it is confined in Order 41,

1. (1969) 1 M.L.J. 126.
2. (1971) 2 M.L.J. 330: 84 L.W. 785: A.I.R. 1972 Mad. 316.
3. (1911) 12 I.C. 684: 15 Cal.L.J. 258.
4. A.I.R. 1941 Oudh. 561.

rule 23 of the Code of Civil Procedure, with its Madras amendment effected in P. Dis. No. 778 of 1930. It has been pointed out in the decisions cited that the power of remand has been circumscribed by the above amendment. In *Ram Dhani* v. *Nagar Mal*[1] the appeal was kept on the file of the appellate Court and only a finding was called for, though the order calling for the finding was termed as an order of remand. The point which was argued seems to have been that the appellate Court itself should have taken the additional evidence. No reference however, is made to Order 41, rule 28 of the Code of Civil Procedure. Anyway, the point to be noted is that the appeal was kept on the file of the appellate Court. The learned Subordinate Judge has not referred to the decisions really applicable to this case like the ones which I have quoted above, which themselves follow the prior decisions of this Court in which the position was really settled.

8. Even regarding the other point on the propriety of allowing additional evidence, there is substance in the contention of Mr. Balasubramaniam that the petition for receiving additional evidence was itself filed in the trial Court only at a late stage. In other words, this is not therefore a case where it can be said within the meaning of Order 41, rule 27 (*a*) that the trial Court refused evidence which ought to have been admitted, and it cannot be said that, even if the petition was filed late, it ought to have been admitted by the trial Court. This point also may be examined by the learned Subordinate Judge, though if in the exercise of his discretion, he wants to allow the plaintiff to have this opportunity, this Court would not stand in his way.

9. The order of the learned Subordinate Judge is therefore set aside and he is directed to dispose of the appeal himself according to law and in the light of the observations contained in this judgment. Even if he considers that the additional evidence should be recorded, he should keep the appeal on his file. There will be no order as to costs, on this appeal.

S.J. *Appeal allowed.*

1. A.I.R. 1941 Oudh. 561.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*M. M. Ismail, J.*

P. D. Balasubramaniam .. *Petitioner**

v.

The Corporation of Madras represented by its Commissioner, Madras 3 .. *Respondent.*

Madras City Municipal Corporation Act (IV of 1919), section 96, Tamil Nadu City Municipal Act (LVI of 1961), section 102, Schedule II, rule 5—Time-barred arrears of property-tax—Employee held responsible—Punishment imposed by Commissioner of Corporation—Recovery of arrears directed from pay of employee—Punishment whether validly imposed.

The power to order recovery of pecuniary loss suffered by the Corporation from the pay of an employee is one of the punishments that can be imposed by the Commissioner under section 96 (of the Madras City Municipal Corporation Act) and it is that power which is said to have been preserved by section 102 of the amending Act (LVI of 1961), and rule 5 of Schedule II to the amending Act in the judgment of the Bench (in W.A. No. 188 of 1967) in respect of employees who were in service of the Corporation prior to the Tamil Nadu Act LVI of 1961. [*Para.* 5.]

The Commissioner had therefore the power to order recovery of the loss suffered by the Corporation from the pay of the writ-petitioner. [*Para.* 6.]

Case referred to :—

Sivanarayananal v. *The Corporation of Madras by its Commissioner and The Revenue Officer, Corporation of Madras,* W.P. No. 4779 of 1965 and W.A. No. 188 of 1967.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Respondent herein culminating in the order, dated

* W.P. No. 619 of 1974. 30*th April,* 1974.

26th February, 1974 communicated in R.D.C. No. 78593, dated 7th March, 1974 and quash the order, dated 26th February, 1974.

R. Krishnamurthy, for Petitioner.

R. Thillai Villalan, for Respondent.

The Court made the following

ORDER.—The petitioner herein is an assessor in the service of the Corporation of Madras. By an order, dated 7th March, 1974, the Commissioner, Corporation of Madras, directed recovery of a sum of Rs. 4,000-05 from the salary of the petitioner herein at Rs. 50 per mensem, beginning from March, 1974, payable on 31st March, 1974 onwards till the entire amount is recovered from him. This order was passed on the finding that the petitioner was responsible for the time-barred arrears of property tax in Division No. 26 for the second half year 1968-69 and the first half year 1969-70, that he had not accounted for the items contained in the list and that in addition he had failed to submit reports called for, although reminders were issued. It is this order that is sought to be quashed in the present writ petition.

2. The solid ground urged in support of this writ petition is the decision of K. N. Mudaliyar, J., dated 29th March, 1973 in W.P. No. 2451 of 1972. The learned Judge held that after the introduction of the Tamil Nadu Act (LVI of 1961) by which section 96 of the City Municipal Corporation Act has been repealed, the Commissioner did not have the power to order recovery of the amount as he had done in the present case.

3. However, the learned Counsel for the Corporation now represents to me that the petitioner herein was in service before the coming into force of the Tamil Nadu Act (LVI of 1961) by which section 96 of the City Municipal Corporation Act has been repealed and that therefore it is the unrepealed provisions, as preserved in the transitory provisions, that would apply to the case of the petitioner.

4. By the Tamil Nadu City Municipal Act, 1961, namely, Tamil Nadu Act (LVI of 1961), elaborate changes were made in the Madras City Municipal Act, 1919. One of the changes that was made by this amending Act was that section 49 of the amending Act substituted a new group of sections for sections 85 to 97 of the original Act. Section 96 of the original Act provided that the authority competent to appoint an officer or servant may impose the enumerated penalties which included recovery from pay of the whole or part of any pecuniary loss caused to the Corporation. By the amending Act, section 96, those terms had been repealed. It is in view of this only K. N. Mudaliar, J., in the judgment referred to above came to the conclusion that after the Tamil Nadu Act LVI of 1961, the Commissioner had no power to order recovery of the amount from the pay of a corporation employee.

5. However, one fact that has to be considered, as far as the present case is concerned, is, as I have pointed out already, the petitioner was in the service of the Corporation even before the commencement of Tamil Nadu Act LVI of 1961. With reference to the amendments introduced by this Act, section 102 of that Act made some transitory provisions. Section 102 (1) of the amending Act stated that in regard to the first constitution of the central committee, any circle committee, the corporation accounts committee, the contracts committee, the licence appeals committee or the appointments committee in accordance with the provisions of the principal Act as amended by that Act and otherwise in first giving effect to the said provisions, they shall be read subject to the rules in Schedule II. Schedule II contains five rules and the fifth rule is:

> "5. Every person included in the Corporation establishment immediately before the date of the commencement of this Act and who was employed by the Corporation wholly or mainly in connection with the affairs of the Corporation immediately before the said date shall, on and from that date, hold his office in the Corporation by the same tenure, at the same remuneration and upon the same tenure, and upon the same terms and conditions and with the same rights and privileges as to pension and gratuity and other matter as he would have held the same on the date aforesaid if this Act had not

been passed and shall continue to do so unless and until his remuneration, terms and conditions and his rights and privileges are so altered as to be on the whole not less favourable to him than those to which he was entitled immediately before the said date."

This rule came up for consideration before this Court in *Sivanarayananal* v. *The Corporation of Madras by its Commissioner and The Revenue Officer, Corporation of Madras*[1] arising therefrom. In that case, pending disciplinary proceedings and before final orders were passed, the Commissioner placed a Class III employee under suspension. The jurisdiction of the Commissioner to take disciplinary proceedings against the employee was challenged in that writ petition on the basis of the deletion of section 96 by the amending Act LVI of 1961 referred to already. Kailasam, J., who dealt with the writ petition in the first instance dismissed the same and that dismissal was affirmed by a Bench in the writ appeal referred to above. The Bench in the writ appeal pointed out :

"Section 96 has been recast and in its present form, it does not speak of conferment of power to mete out any punishment. In view of this, it is urged upon us that the effect of the amendment, just referred to, was to take away the disciplinary power of the Commissioner *vis-a-vis* the Corporation employees, particularly those belonging to Class III category. But section 102 provided the power for making transitory provisions, Schedule II to Madras Act LVI of 1961, by rule 5, clearly covers the gap brought about by the said amendment and preserves to the Commissioner all the disciplinary powers which he had immediately before the enactment and coming into force of Madras Act LVI of 1961. The employees who had been appointed to the service of the Corporation prior to the Act would continue to hold office on the same tenure and under the same terms and conditions and with the same rights and privileges as to pension and gratuity and other matters as before the amending Act. This phraseology, in our opinion, is broad enough to cover disciplinary proceedings, Kailasam, J., was, therefore, right in taking the view that the Commissioner did have the power to take disciplinary proceedings against the appellant and inflict such punishment as he may under section 96."

The above observation of the Bench fully applies to the facts of this case. The Bench had pointed out clearly that the power to take disciplinary proceedings against the appellant in that case and inflict such punishment as the Commissioner may under section 96 was preserved. As I have pointed out already, the power to order recovery from the pay is one of the punishments that can be imposed by the Commissioner under section 96 and it is that power which is said to have been preserved by section 102 of the amending Act and rule 5 of Schedule II to the amending Act in the judgment of the Bench referred to above in respect of employees who were in service of the Corporation prior to the Tamil Nadu Act LVI of 1961.

6. Mr. B. Krishnamurthy, learned Counsel for the petitioner, sought to distinguish the judgment of the Bench by pointing out that the said judgment was concerned merely with the power of the Commissioner to suspend a Corporation employee during the pendency of the disciplinary proceedings. I am unable to accept this argument, in view of the law laid down by the Bench as to the effect, of section 102 and rule 5 of Schedule II to the amending Act LVI of 1961, in the extract of the judgment, given above. Consequently following that judgment, I hold that the Commissioner had the power to order recovery of the amount from the pay of the petitioner.

7. Therefore, the Writ Petition fails and is dismissed. There will be no order as to costs.

S.J. —— *Petition dismissed.*

1. W.P. No. 4779 of 1965 and W.A. No. 188 of 1967.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

The District Official Receiver, Tirunelveli .. *Petitioner**

v.

Lakshmi Ammal and others ... *Respondents.*

Provincial Insolvency Act (V of 1920), section 75—High Court's powers—Scope—Finding of fact—Finality—No interference by High Court.

The scope of the powers of the High Court under section 75 (1) of the Provincial Insolvency Act is narrow. Interference is possible by the High Court against the order of the District Court only on a question of law. The findings of fact rendered by the tribunals created under the Act are findings which are final as provided for in section 75 (1) itself. [*Para.* 3.]

Petition under section 75 (1) of the Provincial Insolvency Act (V of 1970) praying the High Court to revise the Order of the District Court, Tirunelveli, dated 25th September, 1971 and made in C.M.A. Nos. 90 of 1970 and 89 of 1970 and 88 of 1970 respectively (in I.A. Nos. 98 of 1967, 24 of 1968 and 99 of 1967) respectively in I. P. No. 14 of 1961, Subordinate Judge, Tirunelveli.

P. Ramaswami, for Petitioner.

K. Ramaswami and *K. Venkataswamy*, for Respondents.

The Court made the following

ORDER.—Three sales evidenced by Exhibits A-1 to A-3 were attacked by the Official Receiver, Tirunelveli, on the ground that the vendor under those deeds of sale was later adjudicated insolvent within two months from the date of such transactions and that two of the vendees therein were his own creditors and that he fraudulently preferred those two creditors and in any event all the sales are vitiated because they were not for valuable consideration and they were made with the intention to enable the insolvent to defeat and delay his creditors. During the pendency of these proceedings, the insolvent died and his legal representatives are before me as respondents. The Official Receiver's case is that the alienees did not examine themselves to prove that the sales were supported by consideration and that they were not for the purpose of fradulently preferring some of the creditors or not for the purpose of defeating or delaying the other creditors. The lower Court, however, accepted the recitals in the registered deeds as *prima facie* evidence and for that purpose relied upon the testimony of R.W. 1, the karnam of the village who was an independent witness.

He spoke to the value of the property and also to the fact that the sales were for a fair price and for marketable consideration. In those circumstances, factually the Court below held that the vendees under Exhibits A-1 to A-3 obtained the sales for valuable consideration and in good faith and they were not intended to defeat and delay the other creditors of the insolvent. It is as against these orders the present civil revision petitions have been filed under section 75 (1) of the Provincial Insolvency Act.

2. Though it is characterised as a civil revision petition, the scope of these proceedings which are special ones arising out of the first proviso to section 75 (1) of the Provincial Insolvency Act has certain special features. The High Court, in any case, and for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the records and pass such orders with respect thereto as it thinks fit. No doubt this provision enables a dissatisfied party in such proceedings before the District Courts to call for the attention of the High Court and for the High Court to exercise its jurisdiction under the first proviso to section 75 (1). Under section 75 (1) *inter alia* the Receiver who is aggrieved by a decision of the insolvency Court which is subordinate to a District Court may appeal to the District Court and seek for orders. It therefore follows

*C.R.P. Nos. 2639, 2647 and 2650 of 1972.
2nd May, 1974.

that the Official Receiver has the right to invite the attention of this Court also to call for a decision from the High Court if in his view the District Court in its appellate jurisdiction passed an order which is not in accordance with law. It is in these circumstances, the present proceedings come up before me.

3. Undoubtedly these proceedings are maintainable under the special provision under section 75 (1) of the Provincial Insolvency Act. But as I said, the scope of the power of this Court to exercise under the said provision is rather narrow. It can only interfere on a question of law. When the Legislature, therefore, vests such a narrow and peculiar jurisdiction in the High Court, under a special enactment, then the exercise of its jurisdiction has to be within the limits pointed out by the statutory provision. When the statutory provision, therefore, says that interference is possible by the High Court against the orders of the District Court in questions of law, it follows that findings of fact rendered by such tribunals created under the Act are findings which are final as provided for in section 75 (1) itself.

4. The question, however, in the instant case is whether the non-examination of the vendees under Exhibits A-1, A-2 and A-3 by itself lends support to the contention of the learned Counsel for the petitioner that a question of law has arisen in these proceedings. I am unable to agree with this contention. A litigant has an option either to get into the box to prove his case or otherwise satisfy the Court or Tribunal concerned by letting in substitute or alternative evidence in order to substantiate his case. Instead of themselves going into the box and parrot-like repeating that the consideration paid by them under the challenged exhibits is proper and in accordance with the prevailing market price, the vendees examined the karnam as an independent witness who satisfied the Court that the consideration paid under the said documents was proper. The other question is whether the petitioner himself has let in any substantial evidence to set at naught registered documents under which title to property has admittedly passed by reason of the insolvent selling the property for consideration to the vendee under Exhibits A-1 to A-3. Except for the bare *ipse dixit* nothing substantial was proved or brought on record by the petitioner in these petitions to challenge the regularity or the genuineness or even the propriety of the sale. It was in these circumstances that both the insolvency Court (the Subordinate Judge of Tirunelveli) and the District Judge, Tirunelveli, concurred in finding that the sales are not hit by sections 53 and 54 of the Provincial Insolvency Act. As a matter of fact they found that they are genuine transactions and are not tainted with any *mala fide* intention. They have also added that all the sales are supported by valuable consideration. These are all findings of fact which this Court cannot lightly dislodge under the first proviso to section 75 (1) of the Act.

5. Barring these, no acceptable contention has been placed before me to interfere with the order of the District Court. As this Court can only exercise jurisdiction in a limited way and cause interference with such orders and as I said such interference is possible only if there is any error of law in the order challenged, I am unable to set aside the orders of the Courts below as no such error of law is either apparent or has been placed before me.

6. The civil revision petitions are dismissed. No costs.

R.S. ——— *Petition dimissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

Veerabadra Pillai .. *Appellant**

v.

Rajeswari Vedachalam .. *Respondent.*

Limitation Act (XXXVI of 1963), *Article 47—Money paid on the footing of existing liability—Subsequent judicial declaration that there was no liability —Date of failure of consideration—Article 47 —Ingredients to be established—Order* 33, *Rule* 5 (d) (1) *and Madras Amendment—Bar of limitation* prima facie.

The appellant's money was paid to the respondent or was forcibly taken from

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*A.A.O. No. 295 of 1972. 19*th April*, 1974.

him on the footing that there was an existing liability on the part of the appellant to pay that amount to the respondent. The question whether the liability was existent or non-existent could not be decided on the date of the forced payment. It was as a matter of fact judicially decided on 22nd October, 1971, that there was no liability on the part of the appellant to pay the respondent any money. The date of failure of consideration, in such circumstances, is the date when it was so judicially declared.

[*Para.* 5.]

In order to attract the application of Article 47 of the Limitation Act, three ingredients must be established, firstly, the suit must be for money which has been paid by the plaintiff to the defendant; secondly, such money must have been paid upon a consideration which was in existence at the time of the payment; and thirdly, the consideration should have afterwards failed.

[*Para.* 8.]

Held, that the appellant's claim 'appears' not to be barred by the law of limitation.

[*Para.* 10.]

Cases referred to :—

Bassu Kaur v. *Dhun Singh,* (1889) I.L.R. 11 All. 47; *Nathulal* v. *Sualal,* A.I.R. 1962 Raj. 83.

Appeal against the order of the Court of the Subordinate Judge, Cuddalore, dated 6th April, 1974 and made in unregistered O. P. No. 72.

K. Yamunan, for Appellant.

R. Srinivasan, for Respondent.

The Court delivered the following

JUDGMENT.— This is an appeal against the order of the Principal Subordinate Judge, Cuddalore, rejecting the appellant's petition for permission to sue *in forma pauperis* on the ground that under Order 33, rule 5 (*d*-1), Civil Procedure Code, as amended in Madras, the suit "appears" to be barred by the law of limitation. The learned Subordinate Judge rejected the petition *in limine* even before ordering notice to the respondent. In fact, the petition was filed in Court on 5th April, 1972 and on the very next day, that is, on 6th April, 1972, he passed an order rejecting the petition with unholy hurry. One wonders why in the circumstances of the case, he should not have ordered notice and come to a decision after hearing the respondent. The anxiety to fulfil the demands of statistics appears to have precipitated the ill-conceived order of the learned Subordinate Judge.

2. It is necessary to state a few facts before considering whether the petition of the appellant " appears " to be barred by any law (in this case, by the law of limitation). The appellant Veerabadra Pillai was a clerk in the Gingee Branch of Burmah-Shell Depot of the respondent, Rajeswari Vedachalam, who is a permanent resident of Chingleput. The appellant alleged that he was a clerk for the period from 1952 to 1956. G. Venkatrama Naidu, who is the Manager of the respondent, is alleged to have taken the appellant in 1965 from Gingee to Chingleput and accused him of having misappropriated respondent's money to the tune of Rs. 24,858. The appellant further alleged that Venkatrama Naidu wrongfully confined him at Chingleput for 3 days and by practising fraud and undue influence upon him and his wife Andal Ammal, obtained two documents on the unwarranted basis that the appellant had swindled respondent's money to the tune of Rs. 24,858. The first document that Venkatrama Naidu obtained was a sale deed from Andal Ammal, the wife of the appellant, in respect of her house in favour of the respondent for Rs. 8,000. The second document was a promissory note for Rs. 9,672-51 obtained from the appellant and his wife, Andal Ammal in favour of the respondent. The appellant's wife instituted O. S. No. 23 of 1967 on the file of the Court of Subordinate Judge, Cuddalore, for a declaration that the sale deed executed by her had been obtained by coercion and undue influence, for cancellation of the same and for recovery of the property sold with mesne profits. On the other hand, the respondent instituted O. S. No. 144 of 1968 on the file of the Court below against the appellant and Andal Ammal for recovery of monies due under the promissory note

executed by the appellant and Andal Ammal on 20th July, 1965. In both these suits the appellant and his wife contended that no money was really due by the appellant to Rajeswari Vedachalam because the former had not in fact misappropriated any moneys belonging to the latter, that the promissory note and the sale deed had been obtained by coercion and undue influence on the false representation that the appellant had committed misappropriation and that they were, therefore, void. The Court accepted the case of the appellant and his wife and by judgment dated 22nd October, 1971, granted a decree in O.S. No. 23 of 1967 setting aside the sale deed executed by Andal Ammal in favour of Rajeswari Vedachalam and dismissed with costs O. S. No. 144 of 1968, which Rajeswari Vedachalam had filed for recovery of the money due under the promissory note. It is true that Rajeswari Vedachalam has preferred appeals against these two judgments and those appeals are pending.

3. But during the pendency of the appeals and on 5th April, 1972, that is to say, within about six months after the rendition of judgments in O. S. No. 23 of 1967 and O. S. No. 144 of 1968, Veerabadra filed a petition under Order 33, rule 1 of the Civil Procedure Code for permission to sue Rajeswari Vedachalam *in forma pauperis* for recovery of a sum of Rs. 1,401.60. The basis of this claim was formulated as follows. In addition to the promissory note and the sale deed aforementioned and for the purpose of making good the moneys alleged to have been misappropriated by the appellant, the respondent took an agreement for sale of the appellant's lorry for Rs. 15,000 on 19th July, 1965. This agreement itself was unsupported by any consideration. The respondent's agent sold the lorry for Rs. 17,900 and after paying out of the sale proceeds Rs. 1,500 due by the appellant by way of insurance and Rs. 10,113 due by the appellant under a hire purchase agreement with a third party, the balance of Rs. 7,787 was taken by the respondent in discharge of the moneys due by the appellant as a result of the alleged misappropriation made by him. The appellant asked for the recovery of Rs. 7,787, with interest at 12 per cent. per anum from 19th July, 1965 upto the date of claim. The appellant stated that inasmuch as the Subordinate Court had declared in O. S. No. 23 of 1957 and O. S. No. 144 of 1968 that no moneys of the respondent had been misappropriated by the appellant, no moneys were actually due by the appellant to the respondent and that consequently the sale deed of Andal Ammal and the promissory note by the appellant and Andal Ammal and the application of the sum of Rs. 7,787 out of the sale proceeds in discharge of the alleged due were all void.

4. The learned Subordinate Judge in a laconic order held that this claim was barred under Article 113 of the Limitation Act of 1963, because it had not been filed within three years from the date of the agreement of sale of the lorry. It appears from the order that the pauper petitioner was not heard on the question of limitation, nor was his advocate given a hearing.

5. It is contended on behalf of the appellant now that the proper Article applicable to the claim of the appellant is Article 47 of the Limitation Act, which runs as follows :

Description of Suit.	*Period of Limitation.*	*Time from which period begins to run.*
For money paid upon an existing consideration which afterwards fails.	Three years.	The date of the failure.

The question arises, what is the date of the failure of consideration? The appellant's money was paid to the respondent or was forcibly taken from him on the footing that there was an existing liability on the part of the appellant to pay that amount to the respondent. The question whether the liability was existent or non-existent could not be decided on the date of the forced payment. It was a matter of fact decided judicially on 22nd October, 1971 that there was no liability on that date on the part of the

appellant to pay the respondent any money. Can it be said that the consideration failed in this case on the date the failure of consideration was judicially declared ?

6. In fact, in *Bassu Kaur* v. *Dhun Singh*[1] their Lordships of the Privy Council were confronted with a similar problem and this is how they solved it :

> "An action for money paid upon an existing consideration which afterwards fails, is not barred till three years after the date of the failure. (Article 79 of the then Limitation Act corresponding to Article 47 of the present Limitation Act). A debt retained in part payment of the purchase money is in effect, and as between vendor and purchaser, a payment of that part; and if that were doubtful on the first retention while there was yet undecided dispute, it could no longer be doubtful when a decree of a Court of justice authorised the retention, and in effect substituted the land for the debt. Dhun Singh retained the money, and Baru Mal lost the use of it, in consideration of the villages which formed the subject of the sale deed. That consideration failed when the decree of 1884, was made, and it failed nonetheless because the failure was owing to Baru Mal's own reluctance to take it under the conditions insisted on by Dhun Singh."

7. In *Nathulal* v. *Sualal*[2], a house was sold and the price was paid by adjustment of debt due by the vendor to the vendee. The vendee was subsequently dispossessed because it was found that the vendor had no title. The vendee filed a suit for recovery of money more than three years after the date of the sale deed and within three years after the vendee was dispossessed. It was contended that the suit was time barred. But the Court held that the suit was within time under Article 97 of the old Limitation Act, which corresponds to Article 47 of the new Limitation Act.

8. The learned Judge of the Rajasthan High Court held that in order to attract application of Article 97 three ingredients must be established; firstly, the suit must be for money which has been paid by the plaintiff to the defendant; secondly, such money must have been paid upon a consideration which was in existence at the time of the payment ; and thirdly, this consideration should have afterwards failed.

9. Now I shall investigate if the three ingredients are present in the instant case. So far as the first ingredient is concerned, it may be pointed out that the sum of Rs. 7,787 which belonged to the appellant was paid by the appellant to the respondent. It was a payment made involuntarily according to the appellant. As far as the second ingredient is concerned, this amount was paid upon a consideration which was thought to be in existence at the time of the payment on account of the alleged misappropriation by the appellant. Thirdly, this consideration failed according to the judgment in O.S. No. 23 of 1967 and 144 of 1968. These judgments have not been reversed and must be deemed for the time being to be correct for the purpose of deciding the question arising in these pauper proceedings.

10. Having regard to the citations quoted before me, I have no option but to hold that the learned Subordinate Judge erred in thinking that the appellant's claim *in forma pauperis* 'appears' to be barred by the law of Limitation. On the contrary, it 'appears' not to be barred.

11. I wish to make it clear that I am not deciding the question of limitation in these proceedings. It is left open to be agitated if and when the pauper petition of the appellant is allowed and the respondent attacks the claim in the suit as barred by the law of limitation. Suffice it for the present purpose to hold that the trial Court acted illegally in rejecting the petition of the appellant on the ground that that the claim embodied therein appears to be barred by the law of limitation.

12. The order of the Court below is, therefore, set aside and the appeal allowed. The lower Court is directed to restore the petition to its file and

1. (1889) I.L.R. 11 All. 47.
2. A.I.R. 1962 Raj. 83.

proceed with it in accordance with law on the basis that the claim does not appear to be barred by any law. The costs of the appeal will abide the result of the suit.

R.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Maharajan, J.*

K. P. Chidambara Mudaliar .. *Appellant**

v.

V. S. Rukmani Ammal .. *Respondent.*

Civil Procedure Code (V of 1908), section 48 —Execution petition—Dismissed for statistical purposes—Subsequent execution petition within 3 years—Whether within time—Subsequent petition continuation of the earlier application.

Where an execution petitioner being invited to lighten the file of the Court in which the execution petition was pending for nearly three years did not press the petition and it was dismissed, and within three years of the date of such dismissal for statistical purposes another execution petition was filed.

Held, the subsequent execution petition would be regarded as a composite petition containing a prayer to continue or revive the prior execution petition plus a fresh execution petition in respect of such fresh claim, both as regards money and property, as might not have been barred by limitation. The mere addition of a claim in the later petition cannot *ipso facto* convert what was essentially an application for continuation or revival into an independent execution petition.

[*Paras.* 4 *and* 5.]

Appeal against the order of the District Court, North Arcot at Vellore, dated 8th September, 1972 and made in C.M. A. No. 63 of 1972 (E.P. No. 47 of 1969 in O. S. No. 133/48 Subordinate Judge, Vellore.

V. Srinivasan, for Appellant.

D. K. Srinivasagopalan, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the judgment of the District Judge of North Arcot confirming in appeal, the order of the Principal Subordinate Judge, Vellore holding that the execution petition filed by the respondent was not barred by time. One Govinda Ammal, who was the wife of the appellant Chidambara Mudaliar, obtained a decree for maintenance against her husband in O. S. No. 133 of 1948 on the file of the Sub-Court, Vellore. Under the decree the husband was liable to pay the wife, for the term of her life, maintenance at the rate of Rs. 150 per mensem from 9th September, 1948. The maintenance decree itself was granted on 13th July, 1949. On 4th October, 1960 the decree was amended by providing for sale of the charged properties in case the judgment-debtor defaulted to pay. The decree-holder died on 27th September, 1961. Rukmani Ammal, who was the daughter and heir of Govinda Ammal, the decree-holder, filed E.A. No. 196 of 1963 on 20th March, 1963, for recognising her as the legal representative of her deceased mother on foot of a registered will executed by her. She also filed on 19th June, 1963 E. P. No. 147 of 1963 for execution of the decree in respect of the amount that had accrued due upto 27th September, 1961, the date of death of the decree-holder. Both these applications were dismissed on 4th June, 1966 as not pressed. The petitions were not pressed evidently because the judgment-debtor took the objection that without production of letters of administration Rukmani Ammal was not competent to execute the decree. Subseqently she obtained letters of administration and filed E. P. No. 47 of 1969, which though numbered in 1969 had been filed on 2nd December, 1968 itself. It was this execution petition that the judgment-debtor attacked as barred by limitation. Both the executing Court and the first appellate Court have repelled this contention and directed execution to proceed. It is against the order of the first appellate Court concurring with that of the executing Court that the present appeal has been filed. In order to find out if the decree was alive, we have to refer to certain relevant events and con-

* A.A.A.O. No. 117 of 1972. 29*th March*, 1974.

sider them in the light of the provisions of the Limitation Act of 1908. The maintenance decree, as I have already noted, was granted on 13th July, 1949 and it would be ordinarily barred on 13th July, 1961 in respect of arrears due up to 13th July, 1949 under section 48, Civil Procedure Code, but then it was amended on 4th October, 1960. Under clause (4) of Article 182 of the old Limitation Act, a period of limitation of three years will be available to the decreeholder from the date of amendment. The combined effect of section 48, Civil Procedure Code and Article 182 (4) of the old Limitation Act is to extend by three years the period of limitation of twelve years prescribed by section 48, Civil Procedure Code. The decree in respect of past maintenance would then get barred on 4th October, 1963, that is to say, on the expiry of three years from the date of its amendment. As for the decree in respect of future maintenance, it was a recurrent liability and the decree in respect of liability for each month after the date of the decree would get barred on the expiry of 12 years after the concerned monthly maintenance became due.

2. The decree-holder died on 27th September, 1961, and her daughter, who is the respondent in this appeal, filed E.P. No. 147 of 1963 on 19th June, 1963 for realization of Rs. 21,805 by sale of some of the charged items mentioned in the decree. This execution petition was within time. The judgment-debtor opposed this execution petition on the ground that without proof of the will, on foot of which the daughter of the decree-holder claimed the decretal amount, she ought not to be allowed to execute the decree. This forced the daughter to file O.P. No. 49 of 1966, on the file of the District Court at Vellore for grant of letters of administration on foot of the will executed by her mother, Govindammal. That original petition was opposed by the judgment-debtor and it was therefore pending for a considerable time. The result was that E.P. No. 147 of 1963 was being adjourned from time to time for production of letters of administration.

3. On 4th June, 1966, that is to say, after E.P. No. 147 of 1963 had been kept pending for nearly three years, the decree-holder's daughter, evidently to oblige a statistically-minded Court, made the following endorsement :—

> "Without prejudice to filing another petition this application is not pressed now and it may be dismissed for statistical purposes as not pressed."

The Court jumped at this endorsement and passed the following order :—

> "Dismissed as not pressed".

4. The learned Subordinate Judge has rightly held that the endorsement was made by the decree-holder's daughter, not because she had committed any default in carrying forward the execution petition, but because, for reasons beyond her control, the letters of administration she had applied for had not yet been granted by the District Court. The learned District Judge erred when he held, in appeal, that the dismissal of E. P. No. 147 of 1963 was not effected for statistical purposes. Any one, who could read between the lines, would see clearly that E.P. No. 147 of 1963 was not pressed because the execution petitioner was invited to lighten the file of the Court in which the execution petition had remained pending for nearly three years. It would then follow that when the respondent filed E.P. No. 47 of 1969 on 2nd December, 1968, that is to say, within three years after the date on which E.P. No. 147 of 1963 was dismissed for statistical purposes, that execution petition must be regarded as a continuation or revival of E.P. No. 147 of 1963.

5. Learned Counsel for the appellant contends that it cannot be so regarded for two reasons :

> (*i*) certain items not included in the earlier execution petition have been included in the later execution petition ;
>
> (*ii*) the amount claimed in the latter execution petition is larger than that claimed in the earlier one.

I do not think that the additional items against which sale is prayed for and the additional amount for which execution is sought to be levied, can detract from the character of the subsequent execution petition, which is in essence a continua-

tion or revival of the earlier execution petition. It may be that if any claim is made in the subsequent execution petition for the first time after the period of limitation of twelve years had expired, that part of the claim is liable to be rejected as barred by time. But then, the decree was for monthly maintenance and the amount was accruing due each month till the original decree-holder died; and the decree-holder or her legal representative would be entitled to execute the decree for each monthly instalment within a period of twelve years thereafter. If any such claim, which was not barred by time, was included in the subsequent execution petition it goes without saying that it can be enforced, notwithstanding the fact that in respect of the amount claimed in the previous execution, the subsequent execution petition would be treated merely as a revival or continuation of the previous one. In other words, the subsequent execution petition would be regarded as a composite petition containing a prayer to continue or revive the prior execution petition plus a fresh execution petition in respect of such fresh claim, both as regards money and property as might not have been barred by limitation. The mere addition of a claim cannot *ipso facto* convert what is essentially an application for continuation or revival into an independent execution petition. I would therefore hold that E.P. No. 47 of 1969, which was filed on 2nd December, 1968, must be regarded as only a continuation of E.P. No. 147 of 1963, which, having been filed within the period of limitation allowed by law, was clearly in time.

6. Consequently, the appeal of the judgment-debtor fails and will stand dismissed with costs. Leave refused.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

A. S. Muthiah and others .. *Appellants**

v.

Peter Nadar and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 43—Estoppel feeding the grant—Person having tangible interest in property attesting sale of property—Effect.

It cannot be said that unless section 43 of the Transfer of Property Act comes into play a party cannot sustain his claim or right on a mere rule of estoppel. The principle can be invoked in the interests of justice. [*Paras.* 12 *and* 13.]

If a person having tangible interest in the property affected by a deed, attests that deed his attestation should be taken as proof of his consent to and acknowledgment of the correctness of the recitals in the deed. He will therefore, be estopped from questioning the transaction. [*Para.* 10]

Cases referred to :—

Narayana Aiyar v. *Rama Aiyar,* (1915) I.L.R. 38 Mad. 396 : 20 I.C. 625 : 25 M.L.J. 219 ; *Janakiram Sital Ram Firm* v. *The Chota Nagpur Banking Association Limited,* (1936) I.L.R. 15 Pat. 721 ; *Ramaswamy Goundar* v. *Ananthapadmanabha Iyer,* (1971) 1 M.L.J. 392; *Banwari Lal* v. *Sukhdarashan,* (1973) 1 S.C.W.R. 19 : (1973) 1 S.C.C. 294 : A.I.R. 1973 S.C. 814 ; *S. Shanmugam Pillai* v. *K. Shanmugam Pillai,* (1973) 2 S.C.C. 312 ; *Nayakammal* v. *Munuswamy,* 20 L.W. 222 : 84 I.C. 231. : A.I.R. 1924 Mad. 819.

Appeal against the decree of the Court of the Subordinate Judge Tirunelveli in Appeal Suit Nos. 70 and 90 of 1968 preferred against the decree of the Court of the District Munsif of Kovilpatti in Original Suit No. 405 of 1965.

R. Srinivasan, for Appellants.

P. Ananthakrishnan Nair, for Respondents.

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* S. A. No. 1219 of 1969 and Memorandum of Objections.

26th November, 1973.

The Court delivered the following

JUDGMENT.—The legal representatives of the first plaintiff and plaintiffs 2 to 4 are the appellants. The suit was for a declaration of title and recovery of possession of the plaint schedule properties.

2. The suit properties originally belonged to one Srinivasagam Pillai. He died in 1909 leaving a registered Will, dated 12th January, 1909. This Will was probated in O.P. No. 291 of 1909, on the file of the District Court, Tirunelveli. As per the Will the suit properties should be enjoyed by the testator's daughter Kothai Grace Devadoss Ammal and on her death they should be taken by her children, plaintiffs 1 to 4 being her sons and plaintiffs 5 and 6 being her daughters. Appellants 4 to 6 are the legal representatives of the first plaintiff who died during the pendency of the first appeal. During the life-time of Kothai Grace Devadoss Ammal, she made several alienations in respect of the suit properties and ultimately the properties comprised in the eight schedules appended to the plaint came into the hands of defendants 1 to 8. In December 1962, Kothai Grace Devadoss Ammal died and the plaintiffs in the suit, as the children of Kothai Devadoss Ammal, claimed interest in the suit properties.

3. The defence was, the properties in the hands, of Kothai Grace Devadoss Ammal were her absolute properties, having been got in a partition between herself and her brothers. Kothai Grace Devadoss Ammal sold the plaint-scheduled properties under Exhibit B-1., dated 17th March, 1941 in favour of one Arumugham and others. After changing many hands, the properties ultimately came into the possession of defendants 3 to 8. The aforesaid sale deed Exhibit B-1 has been attested by plaintiffs 1 and 3. Exhibit B-1 recited that Kothai Grace Devadoss was the absolute owner of the properties conveyed thereunder. Therefore, according to the defence, the plaintiffs are estopped from contending that Kothai Grace Devadoss Ammal had only a life-interest in the properties.

4. The first defendant is a direct purchaser from Kothai Grace Devadoss Ammal under Exhibit B-11 dated 29th February, 1948, in respect of Schedule 1 of the suit properties. It was alleged by him that plaintiffs 1 and 3 by their having attested Exhibit B-1 sale deed made others believe that Kothai Grace Devadoss Ammal had an absolute interest in the suit properties and as such the plaintiffs are estopped from putting forth the present claim.

5. It has also been the contention of the defendants that they are *bona fide* purchasers for value in good faith, that they effected improvements to the properties and that therefore in any event the value of the improvements should be paid by the plaintiffs.

6. The trial Court decreed the suit. The lower appellate Court found that Kothai Grace Devadoss Ammal did not have absolute interest in the suit properties, that plaintiffs 1 and 3 are estopped from putting forth any claim in respect of the suit properties and that the one-third interest of the plaintiffs 1 and 3 in the suit properties passed on to the alienees *viz.*, defendants 3 to 8 . The lower appellate Court also found that there is no question of any estoppel as pleaded by the first defendant but that the first defendant is entitled to the value of the improvements effected by him in relation to Schedule 1 of the suit properties, *viz.*, a sum of Rs. 9,371. It has also held that defendants 3 to 8 are also entitled to the value of improvements effected by them but that equities could be adjusted while allotting the properties. The result was the plaintiffs on record got a decree for declaration and possession in respect of plaint Schedules 1 and 2 and a two-thirds share in plaint Schedules 3 to 8.

7. Aggrieved by the decision of the lower appellate Court, the legal representatives of the first plaintiff and plaintiffs 2 to 4 have filed this second appeal. Thiru Parasaran, the learned Counsel appearing for the appellants, contended that the defendants are in the position of co-owners and that they cannot claim the value of improvements except under specified circumstances. He also submitted that the rule of estoppel cannot be invoked by the defendants successfully. Thiru P. Balasubramanian, the learned Counsel appearing for the respondents-defendants started by arguing the cross-

objections filed by them which are *inter alia* to the effect the Kothai Grace Devadoss Ammal had an absolute interest in the suit properties and that the Will in her favour under A-1 did not include the suit properties.

8. It has been held by both the Courts below that Kothai Grace Devadoss Ammal could have only a limited interest in the suit properties. This is a finding of fact arrived at on a proper appreciation of the evidence on record and as such I confirm the said finding.

9. Thiru P. Balasubramanian next contended that Exhibit B-1 sale deed has been attested by plaintiffs 1 and 3 after taking active part in bringing about Exhibit B-1, that they are, therefore, definitely estopped from questioning the sale under Exhibit B-1 and that in view of that defendants 3 to 8 are entitled at least to the extent of the share belonging to plaintiffs 1 and 3 in the suit properties. The learned Counsel cited the decision in *Nayakammal* v. *Munuswamy*[1] for the following position:

> " It is the commonest thing in this country for attestations to be obtained from persons having a possible interest in the property with the object of binding them later on."

The learned Judge deciding the case observed :

> " I have rarely come across a case where a person having an interest present or contingent in the property has attested the deed, without enquiring into its contents."

For the same position, he also cited the decision in *Narayana Aiyar* v. *Rama Aiyar*[2] as also *Janakiram Sital Ram Firm* v. *The Chota Nagpur Banking Association Limited*[3], wherein it is stated :

> " Where a co-sharer mortgaged certain houses alleging them to be his self-acquisition and the other co-sharers stood by, and being aware of the contents, attested the same and the mortgagee on his representation advanced the loan and in execution of a decree on the basis of the mortgages purchased the mortgaged property, but was resisted at the time of delivery of possession by persons who claimed to have purchased in execution of a money decree against the co-sharers of the mortgagor and under a sale deed executed by them, the attesting co-sharers and the purchasers of their interest were estopped from challenging the title of the mortgagee auction-purchaser in this suit in ejectment."

10. The next case relied on by Thiru P. Balasubramanian, *Ramaswamy Goundar* v. *Ananthapadmanabha Iyer*[1], has held :—

> " Where a person, having a tangible interest in the property affected by a deed, attests that deed, his attestation should be taken as proof of his consent to and knowledge of the correctness of the recitals in the deed. Therefore, in the facts and circumstances of the case, *A* and *R*. were estopped from contending that *M* had only a life interest and did not have an absolute interest in the property in question and consequently, the plaintiff as the successor-in-interest of *A* and *R*, is also estopped from putting forward that contention."

Relying on the above decision, the learned Counsel argued that the plaintiffs are estopped from claiming any interest in the suit properties. But it is clear from the facts of the case on hand that except the first and third plaintiffs the other plaintiffs cannot be non-suited on the plea of estoppel, inasmuch as they were neither parties nor attestors to Exhibit B-1. The lower appellate Court has correctly held that plaintiffs 1 and 3 alone are hit by the rule of estoppel. I am, therefore, in complete agreement with the finding arrived at by the lower appellate Court on the plea of estoppel.

11. On the question of " improvements " also, the lower appellate Court has, in detail, examined the nature of the improvements and the value thereof and has given a finding thereon. This is a pure ques-

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1. 20 L.W. 222: 84 I.C. 231: A.I.R. 1924 Mad. 819.
2. (1915) I.L.R. 38 Mad. 396: 20 I.C. 625: 25 M.L.J. 219.
3. (1936) I.L.R. 15 Pat. 751.

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1. (1971) 1 M.L.J. 392.

tion of fact and as such I do not think there is any point of law to set aside the finding as regards value of improvements.

12. Thiru Parasaran, the learned Counsel appearing for the appellants-plaintiffs, cited the decision in *Banwari Lal* v. *Sukhdarashan*[1] and argued that the plea of estoppel is not available to the defendants in view of the following observations therein :

> "Besides estoppel is but a rule of evidence and except in cases like those under section 43 of the Transfer of Property Act, when a grant is fed by estoppel, the rule does not operate to create interest in property regarding which the representation is made".

On this, Thiru Parasaran submitted that unless section 43, Transfer of Property Act comes into play, a party cannot sustain his claim or right on a mere rule of estoppel. In that case, the plaintiff who filed the suit in a representative capacity as purchasers of plots in the colony called "Chandrapuri Colony" sought for a declaration that plot No. 19 was ear-marked for a Dharmasala and also for a permanent injunction restraining the defendant from interfering with the construction of the Dharmasala and for possession of the plot after demolition of its boundary wall. The defendant denied that plot No. 19 was reserved for the use of Dharmasala and contended that one Manohari Devi, who, under the sale in her favour, had become an absolute owner of the plot, was entitled to sell it to him. Dealing with the facts of that case, the Supreme Court has made a passing observation as stated above. I do not think the contention of Thiru Parasaran as if the rule of estoppel will be available only in cases where section 43, Transfer of Property Act, can be invoked, is made as a proposition of law for all types of cases. The observations of the Supreme Court made in that decision is only in relation to the facts of that particular case and cannot be taken as laying down the principle of applying the law of estoppel for all types of cases.

1. (1973) 1 S.C.W.R. 19: (1973) 1 S.C.C. 294; A.I.R. 1973 S.C. 814.

13. In *S. Shanmugam Pillai* v. *K. Shanmugam Pillai*[1], the Supreme Court has held :—

> "Equitable principles such as estoppel, election, family settlement etc., are not mere technical rules of evidence. They have an important purpose to serve in the administration of justice. The ultimate aim of the law is to secure justice. In the recent times in order to render justice between the parties, Courts have been liberally relying on those principles. We would hesitate to narrow down their scope."

Thus it is clear that the rule of estoppel can be invoked in the interests of justice. The facts of the present case clearly permit the Court to give a finding on the plea of estoppel. The lower appellate Court after elaborately discussing the question of estoppel and the various other aspects of the case has given its considered judgment. I do not find any question of law or miscarriage of justice as such involved, for me to interfere with the findings arrived at by the lower appellate Court.

14. In these circumstances, both the second appeal and the memorandum of cross-objections are dismissed. But there will be no order as to costs in either. No leave.

R.S. ——— *Second Appeal and Memorandum of Cross-Objections dismissed.*

1. (1973) 2 S.C.C. 312.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam and N. S. Ramaswami, JJ.*

Velayudha Konar .. *Appellant**

v.

Kora Miah Sahib and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 91 — Judgment-debtor declared insolvent after final decree in mortgage suit—In subsequent execution proceedings Official Receiver not impleaded—Decree-holder himself purchasing mortgaged property in Court-auction-sale—Official Receiver ignoring Court sale, selling the property to third party—Validity—Remedy of auction-purchaser—If should file application under Order 21, rule 91—If can execute decree again after impleading the Official Receiver.

It is elementary principle that a sale held without making the affected person a party to the proceeding is one made without jurisdiction. As against such persons who were not made parties the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. [*Para.* 10.]

Thus, where after the final decree in a mortgage suit the judgment-debtor was declared an insolvent and in the execution proceedings taken out subsequently the Official Receiver was not made a party and in the Court-sale held in execution of the decree the decree-holder himself purchased the property, but ignoring the above Court-sale the Official Receiver sold the property to a third party,

Held, the Official Receiver had stepped into the shoes of the judgment-debtor before the Court-sale was held. Therefore he ought to have been made a party to the execution proceedings. He not having been so made a party the Court sale was of no effect at all as against him. It was void as far as he was concerned and he could ignore it. There was no need for him to file an application to set aside the sale. Once he exercised such an option the fact that the judgment-debtor was a party to the execution proceedings was of no consequence at all. In such a situation, the Court-auction-sale was just in the same position as one without notice to the judgment-debtor. It was like a third party having been impleaded in the execution proceedings leaving out the judgment-debtor. [*Paras.* 11, 21.]

The Court sale being void, there is no necessity for the Court-auction-purchaser to set aside the same under Order 21, rule 91 of Civil Procedure Code, and all that the execution Court should do is to record the fact that the sale is void. [*Para.* 27.]

The Official Receiver being bound by the mortgage decree the Court-auction-sale without impleading him as a party suffers only from a procedural defect thereby making the sale a void one, the Official Receiver having elected to exercise his right. The Court sale being void as between the Official Receiver and the decree-holder auction-purchaser, the decree-holder would certainly have a right to bring the property to sale again after impleading the Official Receiver. [*Para.* 24.]

Cases referred to :—

Khiarajmal v. *Daim*, (1905) I.L.R. 32 Cal. 296: 32 I.A. 29: 9 C.W.N. 201: 1 C.L.J. 584; *Natarajan* v. *Chandmull Amarchand*, (1971) 1 M.L.J. 474; *Peraya* v. *Kondayya*, I.L.R (1948) Mad 872: 61 L.W. 283: (1948) 1 M.L.J. 290: A.I.R. 1948 Mad 430; *Subbiah* v. *Ramaswami*, I.L.R. (1954) Mad 80: (1953) 2 M.L.J. 766: 1953 M.W.N. 857: A.I.R. 1954 Mad. 604; *Punithavelu Mudaliar* v. *Bhashyam Ayyangar*, (1902) I.L.R. 25 Mad. 406: 12 M.L.J. 282; *Nagubai* v. *B. Shama Rao*, 1956 S.C.R. 451: 1956 S.C.J. 655: A.I.R. 1956 S.C. 593; *Muthukumaraswami Pillai* v. *Muthuswami Thevan*, (1927) I.L.R. 50 Mad. 639: 52 M.L.J. 148: 25 L.W. 232: A.I.R. 1927 Mad. 394. *Chandramma* v. *Guna Seelan*, 61 M.L.J. 316 : 133 I.C. 497: A.I.R. 1931 Mad. 542; *Venkata Reddy* v. *Kunjappa Goundan*, I.L.R. 47 Mad.

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* L.P.A. No. 8 of 1969. *4th January*, 1974.

551: 46 M.L.J. 391: 20 L.W. 137: A.I.R. 1924 Mad. 650.

Appeal under clause 15 of the Letters Patent against the order and Judgment of the Honourable Mr. Justice Venkataraman dated 22nd August, 1968 and made in A. A. A. O. No. 153 of 1966 preferred to the High Court against the order of the Court of the Additional Subordinate Judge, Tirunelveli, dated 17th December, 1965 and made in C. M. A. No. 30 of 1965 (E. A. No. 1289 of 1963 in O.S.No. 209 of 1955, District Magistrate Court, Tirunelveli).

K. Sarvabhauman and *T. R. Mani*, for Appellant.

T. R. Rajagopalan and *R. Rajaraman*, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal under the Letters Patent is against the judgment of Venkataraman, J., allowing C.M.S.A. No. 153 of 1966. The appellant before us is a mortgagee-decree holder. After final decree in the mortgage suit, the judgment-debtor had been adjudged insolvent. In the execution proceedings, though the decree-holder took out notice to the judgment-debtor through the Official Receiver in whom the equity of redemption had by then vested due to the adjudication, the Official Receiver had not been made a party to the said proceeding. In the Court sale held in execution of the decree the decreee-holder himself purchased the property but ignoring the above Court-sale, the Official Receiver sold the property to a third party. The appellant before us who was the decree-holder-auction-purchaser was unable to take possession of the property. There were two suits, one filed by the present appellant to set aside a summary order regarding obstruction caused while he attempted to take delivery of a particular item of property, and the other was by the person who was in possession of the other items of property through the Official Receiver to injunct the decree-holder-auction-purchaser from interfering with her possession. In these two suits it had been held that the auction-sale in pursuance of the mortgage decree was void inasmuch as the Official Receiver in whom the equity of redemption had vested (as the judgment-debtor had been adjudged insolvent subsequent to the final decree) had not been made a party.

2. After the decision in the above two suits, the appellant filed E. A. No. 1289 of 1963 in the executing Court purporting to be under section 151 of the Code of Civil Procedure for setting aside the Court-sale and the part satisfaction of the decree which had been recorded earlier. This is obviously with a view to take fresh execution proceedings to bring the property to sale in the presence of the Official Receiver or his successor-in-interest, *viz.*, the first respondent before us, who will hereinafter be referred to as the respondent.

3. The respondent is a person claiming title to the property through the Official Receiver. He contended that even though the Court-sale is not binding on the Official Receiver and that the Official Receiver had conveyed good title to his (respondent's) predecessor-in-title, the Court sale in favour of the appellant was not a nullity, that the appellant's remedy, if any, was to have filed an application under Order 21, rule 91, Code of Civil Procedure, that such an application being barred by time he is without any remedy. This contention of the respondent was however not accepted by the executing Court and the first appellate Court. The respondent filed C. M. S. A. No. 153 of 1966 in this Court and Venkataraman, J., has allowed the appeal holding that the Court sale, though would not bind the Official Receiver, is not a nullity and is valid and binding as between the parties to the proceeding. It is contended on behalf of the appellant that the view taken by the learned Judge is not correct.

4. The main question that arises for consideration is what is the position of the Court auction-purchaser in the execution sale when the Official Receiver

who had not been made a party to the said sale treats it as void as against him and sells the property to a third party, and whether the remedy of the auction-purchaser is to file an application under Order 21, rule 91 of the Code of Civil Procedure, to set aside the Court-sale. If that is the remedy of the Court-auction-purchaser, then E. A. No. 1289 of 1963 filed by the appellant is hopelessly time-barred, for the period of limitation under Article 166 of Limitation Act of 1908 is only thirty days from the date of sale. In the present case, the Court-auction-sale was on 15th September, 1961. The execution application to set aside the sale was filed in 1963. But the contention on behalf of the appellant is that Order 21, rule 91, Code of Civil Procedure, has no application to the facts of the case, that the application filed by the appellant is certainly not one under that provision and that as the Official Receiver had treated the Court-sale as void and sold the property himself to a third party, only that fact has to be recorded by the executing Court and the appellant should be allowed to execute the decree again.

5. Before considering this question, we may dispose of another contention raised, namely, that the respondent is bound by the decree in the suit in which it was held that the Court-sale was void and that therefore it is not now open to the respondent to contend that the Court-sale is not void and that the same is binding on the parties to the proceeding. To appreciate this contention, some more facts have to be noticed.

6. The properties in question were subjected to six mortgages. The appellant before us was the second mortgagee. The mortgage suit that he filed in O. S. No. 209 of 1955 on the file of the Court of the District Munsif, Tirunelveli, in which he impleaded all the puisne mortgagees, as parties. A preliminary decree was passed on 26th March 1956 and final decree was passed on 22nd October, 1956. It is only after the final decree in the mortgage suit, the petition for adjudication of the mortgagor as insolvent came to be filed. That was on 26th June, 1957. The mortgagor was adjudged insolvent on 14th December, 1957. The Official Receiver in whom the hypotheca vested leased out the same except one item, namely, a house, to one Kuppammal. That Kuppammal happened to be the fourth mortgagee of the hypotheca and she had also been impleaded as a party in O. S. No. 209 of 1955. Subsequent to the abovesaid lease in favour of Kuppammal, the Official Receiver auctioned the equity of redemption. That was on 3rd April, 1966 and the highest bidder whose bid was accepted by the Official Receiver was the abovesaid Kuppammal herself. The consideration was only Rs. 11 subject to all the six mortgages. Even though the auction was on 3rd April, 1961, no sale-deed in her favour had been executed by the Official Receiver. There had been controversy between her and her husband by name Sivasankaran Pillai as to in whose name the sale-deed should be executed. According to Sivasankaran Pillai, his wife Kuppammal was only his benamidar when she successfully bid at the auction held by the Official Receiver on 3rd April, 1961 and that, therefore, the Official Receiver should execute the sale in his favour. He filed O.S. No. 144 of 1962 on the file of the Court of the District Munsif, Tirunelveli, in which it was held that Kuppammal, his wife was only his benamidar. Therefore, on 18th October, 1962, the Official Receiver executed the sale-deed only in favour of Sivasankaran Pillai. It is from the said Sivasankaran Pillai, the respondent has purchased the property.

7. In the meanwhile, that is, subsequent to the auction held by the Official Receiver but before the Official Receiver executed the sale deed in favour of Sivasankaran Pillai, Kuppammal filed O.S. No. 27 of 1962 on the file of the Court of the District Munsif, Tirunelveli, for an injunction against the present appellant contending that she is in possession of the hypotheca as a lessee under the Official Receiver and that the Court-auction sale in favour of the appellant being void on the ground that the Official Receiver had not been made a party to those proceedings, the appellant had no right to interfere with her possession.

This suit was decreed on 28th February, 1963, the Court holding that the execution also in favour of the appellant was void.

8. O.S. No. 134 of 1962 is a claim suit filed by the appellant in respect of one of the items of the hypotheca (a house property) in which the judgment-debtor's mortgagor's) brother claimed a right of residence. In that suit also it was held that the Court sale in favour of the appellant was void. However, for the present question, namely, whether the respondent is bound by the decision of the Court to the effect that the Court-sale is void, the decision in O.S. No. 134 of 1962 is not invoked. Only the decision in the other suit, namely, O.S. No. 27 of 1962 is said to bar the respondent from now agitating that the sale is not void and that the same is binding on the parties to the petition. However, the contention on behalf of the appellant in this respect is not correct.

9. As already seen, O.S. No. 27 of 1962 had been filed by Kuppammal only in her capacity as a lessee of the hypotheca from the Official Receiver. No doubt even before she filed that suit, the Official Receiver had held the auction and Kuppammal was the successful bidder. But it is incorrect to say that on the date of the said auction, namely, 3rd April, 1961, the property had been sold to Kuppammal. There can be no doubt that the sale by the Official Receiver was only under the registered document, dated 18th October, 1962 which was in favour of Sivasankaran Pillai, the husband of Kuppammal. Under such circumstances, the respondent cannot be said to be a person claiming title through Kuppammal. Admittedly, the respondent was not a party to O.S. No. 27 of 1962. In fact that suit came to be decreed only subsequent to the hypotheca being sold by the Official Receiver to Sivasankaran Pillai. As already seen, the sale in favour of Sivasankaran Pillai is dated 18th October, 1962 and O.S. No. 27 of 1962 came to be decreed only on 28th February, 1963. However, Sivasankaran Pillai, the purchaser of the property had not been made a party to the said suit. Kuppammal having filed the suit only in her capacity as a lessee under the Official Receiver the decision rendered in that suit cannot be said to bind the respondent who purchased the property from Sivasankaran Pillai to whom the Official Receiver executed the sale, even prior to the decree in O.S. No. 27 of 1962.

10. Coming to the main question, no authority is cited before us covering a situation as in the present case. In this case the Court sale to which the Official Receiver was not made a party has been ignored by the Official Receiver as he is entitled to, and he has sold the property to Sivasankaran Pillai, the predecessor-in-title of the respondent. It is elementary principle that a sale held without making the affected person a party to the proceeding is one made without jurisdiction. If in a given case no notice of the execution sale goes to the judgment-debtor and without such notice his property is sold in Court auction, undoubtedly such a sale is one made without jurisdiction, for, no Court has jurisdiction to sell the property of a person without he being informed about it. It has been held right down from *Khiarajmal* v. *Daim*[1] that the Court has no jurisdiction to sell the property of persons who were not parties to the proceedings were not properly represented. At page 312 it has been pointed out that as against such persons (persons who were not made parties) the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. In a recent case reported in *Natarajan* v. *Chandmull Amarchand*[2], a Bench of this Court to which one of us was a party has also held that a sale without notice to the judgment-debtor is without jurisdiction and hence a nullity.

11. In the present case, the Official Receiver had stepped into the shoes of the judgment-debtor before the Court-sale was held. Therefore, he ought to have been made a party to the execution proceedings. It may be noted that the Official Receiver came into the picture

1. (1905) I.L.R. 32 Cal. 296: 32 I.A. 23: 9 C.W.N. 201: 1 C.L.J. 584 (P.C.)

2. (1971) 1 M.L.J. 474.

only after the final decree in the mortgage suit was passed. Therefore, the Official Receiver is undoubtedly bound by the final decree. However, the execution proceedings in which the property was sold had been taken subsequent to the adjudication of the mortgagor (judgment-debtor), and hence the Official Receiver ought to have been made a party to the said proceeding. He not having been so made a party, the Court sale is of no effect at all as against him. It is void as far as he is concerned and therefore he can ignore it and there is no need for him to file an application to set aside the sale. If the said sale is only voidable at the instance of the Official Receiver, naturally he has to have the sale set aside by any method known to law. But the question of having the Court-sale set aside would arise only in the case of parties to the proceedings. The Official Receiver not being a party to the execution proceeding he can just ignore the sale and that is so because the sale is without jurisdiction as far as he is concerned.

12. But that does not mean that such a Court-sale is a nullity in the sense that even the judgment-debtor can ignore the same. Courts have consistently held that when a person is adjudged an insolvent and his property vests in the Official Receiver it is not as if the insolvent suffers a civil death. If he had executed a mortgage of his properties prior to adjudication, in spite of the equity of redemption vesting in the Official Receiver, on adjudication, still the insolvent would be a person interested in the redemption of the mortgage and he would be a necessary party under Order 34, rule 1 of the Code of Civil Procedure, in a suit on the mortgage. In spite of adjudication, the insolvent is not incompetent to enter into a contract and there is no statutory provision prohibiting the insolvent from transferring his property. Therefore, if the insolvent transfers his property, such a transfer is not wholly void, in the sense that the insolvent himself can ignore that, but the same would not bind the Official Receiver. In *Peraya* v. *Kondayya*[1], a Bench of this Court observed that merely because under section 28 of the Insolvency Act the property vests in the Official Receiver, a transaction entered into by the insolvent was not void for all purposes. Therefore, in the present case, it would be incorrect to say that the Court-sale is void for all purposes. At the same time, the Official Receiver is entitled to ignore the same for, it would never bind him. That is on the basis that a sale held without making him a party to the execution proceedings is void as far as he is concerned. As already mentioned, it is not necessary for the Official Receiver who is not a party to the execution proceeding to file an application to set aside the sale and therefore it may not be correct to say that the sale is only voidable at his instance. In some decided cases, no doubt, it is stated that under such situations, the sale is voidable at the instance of the Official Receiver. That is only to emphasise the fact that a sale is not void for all purposes or that it is a nullity, in the sense that it has no legal existence at all. As already seen, the insolvent, in spite of adjudication, is a person competent to enter into transactions regarding the property. Being a party to the execution proceedings he cannot be heard to say that the proceedings are void even as against him, only on the ground that the Official Receiver had not been made a party.

13. Mr. T. R. Ramachandran, learned Counsel for the respondent, at one stage contended on the basis of certain observations contained in the Full Bench case reported in *Subbiah* v *Ramasami*[1], that the Court-sale in this case is only voidable at the instance of the Official Receiver and it is not void even as against him. But he had to concede that the Official Receiver need not take any steps to have the sale set aside, he not being a party to the proceedings, and that he can just ignore it. If he can so ignore it, it is only on the basis that the sale is void. In the Full Bench case referred above, the question whether a Court-sale of the insolvent's property without making the Official Receiver a party is void as

1. I.L.R. (1948) Mad. 872 at p. 877 (1948) 1 M.L.J. 290: 61 L.W. 283: A.I.R. 1948 Mad. 430.

1. I.L.R. (1954) Mad. 80: (1953) 2 M.L.J. 766: 1953 M.W.N. 857: A.I.R. 1954 Mad. 604.

against the Official Receiver or only voidable at his instance did not really arise. The Full Bench understood the reference made by the Division Bench as restricted only to the single question concerning the proper interpretation of section 37 of the Provincial Insolvency Act. The Division Bench which made the reference thought that there were conflicting decisions regarding the interpretation of section 37 of the Provincial Insolvency Act, and the Full Bench held that the effect of annulling the adjudication is to wipe out the effect of insolvency altogether and to vest the property in the insolvent debtor, subject however to the exceptions provided in section 37. This completely answered the reference as understood by the Full Bench itself. However, the Full Bench went into the alternative contention which was raised on behalf of the respondents in that case.

14. The alternative contention as referred to in the leading judgment by Satyanarayana Rao, J., at page 85 is whatever may be the view to be taken regarding the interpretation of section 37 and the effect of annulment, the objection that the decree and the sale in pursuance thereof are null and void can be taken only by the Official Receiver and not by the insolvent himself who was a party to the proceedings. The learned Judge said that if either of the contentions urged on behalf of the respondents were to be accepted their title could undoubtedly be upheld. That was a case where a mortgage decree was passed after vesting of the equity of redemption in the Official Receiver, but without making him a party to the mortgage suit. Subsequently in the Court-auction in pursuance of the mortgage decree, the decree-holder himself purchased the property. Of course in the execution proceedings also the Official Receiver was not a party. Later the insolvency itself was annulled without making any vesting order. The respondents in the case claimed through the auction-sale. One of the contentions on their behalf was that under section 37 of the Insolvency Act, once the insolvency was annulled without making any vesting order, the adjudication itself is wiped out and it is as if there had been no insolvency at all, and that the effect of the annulment is to vest the title to the property retrospectively in the insolvent. The reference as understood by the Full Bench related only to the above question.

15. However, the Full Bench had allowed the respondents before it to raise the alternative contention that whatever may be the view to be taken regarding the interpretation of section 37 and the effect of annulment, the objection that the decree and the sale in pursuance thereof are null and void can be taken only by the Official Receiver and not by the insolvent himself who was a party to the proceeding. It is in that context, Satyanarayana Rao, J., at page 85, has stated, before entering into discussion, that if either of the contentions urged on behalf of the respondents were to be accepted their title could undoubtedly be upheld. As already seen, the Full Bench answered the reference in favour of the respondents regarding the interpretation of section 37 holding that the effect of annulling the adjudication is to wipe out the effect of insolvency altogether, and therefore, in spite of the equity of redemption having stood vested in the Official Receiver on the date of the mortgage decree and the Court-sale in pursuance of it, the respondent who claimed through the Court sale should succeed. Under such circumstances, what is stated by the Full Bench regarding the alternative contention raised on behalf of the respondents is in the nature of *obiter*.

16. Even the alternative contention did not relate to the question whether the Court-sale was void or voidable as against the Official Receiver. As stated by Satyanarayana Rao, J., at page 85, the alternative contention was whether the objection that the decree and the sale in pursuance thereof are null and void can be taken only by the Official Receiver and not by the insolvent himself who was a party to the proceeding. On this, the Full Bench held that it is not open to the insolvent who was a party to the proceeding to contend that the decree and the execution which followed to which he was a party are null and void and that such a contention can be raised

only by the Official Receiver. As we said, the leading judgment in this case is by Satyanarayana Rao, J., Subba Rao, J. (as he then was), has written a separate but concurring judgment in which the question covered by the reference (as understood by the Full Bench) regarding the interpretation of section 37 of the Insolvency Act and the effect of annulment has not been dealt with, but only the alternative contention raised on behalf of the respondents has been gone into. The learned Judge concurred with the view of Satyanarayana Rao, J., even with regard to the alternative contention and concluded at page 115 that the appellant who is a representative of the insolvent judgment-debtor is precluded from questioning the validity of the sale on the ground that the Official Receiver was not a party to the decree or to the execution proceeding. There can be no dispute about this proposition, namely, that it is not open to the insolvent-judgment-debtor to contend that either the decree or the Court-sale in pursuance of the same is null and void on the ground that the Official Receiver had not been made a party to the proceeding. But the learned Judge obviously for the purpose of emphasising that the proceedings without making the Official Receiver a party are not a nullity in the sense that they had no existence at all (as the validity of the same cannot be questioned by the insolvent-judgment-debtor who is a party to the same) has observed that the said proceedings are not void but only voidable at the instance of the Official Receiver.

17. In an early case, *Punithavelu Mudaliar* v. *Bhashyam Ayyangar*[1], it has been held that the decree, as a mortgage decree directing the sale of the chattels, including the debt in question, is void and inoperative as against the Official Assignee, inasmuch as the whole right, title and interest of the defendant therein devolved by operation of law upon the Official Assignee during the pendency of the suit and before the decree was passed. As already seen, in *Peraya* v. *Kondayya*[2], it has been stated that a transaction entered into by the insolvent was not void for all purposes. That does not mean that the transaction is not void as against the Official Receiver in whom the property had vested. The observation that the transaction is "not void for all purposes" has been made only to emphasise that it is not open to the insolvent to contend that the transaction is void on the score that the Official Receiver was not a party. In *Nagubai* v. *B. Shama Rao*[1], it has been observed that a sale in execution of a decree passed in a defectively constituted mortgage suit does not affect the right of redemption of persons interested in the equity of redemption who have not been impleaded as parties to the action as they should have been under Order 34, rule 1, Civil Procedure Code, but is valid and effective as against the parties to the action. It is also made clear there that the above Rule is applicable even when the person in whom the equity of redemption is vested in the Official Receiver and he has not been made a party to the proceeding resulting in the sale. If the sale does not affect the equity of redemption which had been vested in the Official Receiver as held by the Supreme Court, it means that the sale is void as against him, and not merely voidable.

18. We have said enough to show that the sale is really void as against the Official Receiver, he having not been made a party to the execution proceeding. Assuming that in such a situation the sale is not void but only voidable at the instance of the Official Receiver it makes no difference in this case. Whether we use the word 'void' or 'voidable'—the distinction between the two not always being maintained—there is no dispute that the Official Receiver in this case need not seek to set aside the sale. Mr. Ramachandran, learned Counsel for the respondent, though would not concede that the sale is void as against the Official Receiver, maintained that the Official Receiver can ignore the same and there is no question of his having the sale set aside. In the present case, the Official Receiver has elected to exercise his right (as put by the Supreme

1. (1902) I.L.R. 25 Mad. 406 at pages 422 and 423: 12 M.L.J. 282.
2. (1948) 1 M.L.J. 290: I.L.R. (1948) Mad. 872.

1. 1956 S.C.J. 655: 1956 S.C.R. 451: A.I.R. 1956 S.C. 593 at. p. 603.

Court in the above case at page 603 column 2) and has sold the property to the respondent's predecessor-in-title, ignoring the Court sale. The Court sale may not be void *ab initio*, but once the Official Receiver elects to exercise his right he avoids the same, and, therefore, even if the sale is only voidable at the instance of the Official Receiver, it becomes of no effect at all (void) from the date he so exercises his right. What is the position of the appellant who is the Court-auction-purchaser in such a situation is the question.

19. Relying upon the observations of the Supreme Court in the case referred above, as well as by the Full Bench of this Court in the case mentioned earlier, to the effect that the transaction is valid and effective as against the parties to the same, Mr. Ramachandran, learned Counsel for the respondent contends that it is not open to the appellant who was a party to the Court-auction-sale now to say that the sale is not valid. We are unable to accept this contention. It should be noted that in the case before the Full Bench as well as that before the Supreme Court, the Official Receiver had not elected to exercise his right. In fact in the case before the Full Bench, the adjudication having been subsequently annulled, on the interpretation of section 37 of the Insolvency Act, the annulling of the adjudication was to wipe out the effect of insolvency altogether and to vest the property in the insolvent-debtor. In the case before the Supreme Court, the finding was that there was really no vesting of the property in the Official Receiver.

20. That was a case in which a maintenance suit on behalf of one Devamma who was then a minor was filed in the year 1919. There was a decree in that maintenance suit in the year 1921 charging the properties of one Kesavanand for the maintenance awarded. In the meanwhile, that is, after the institution of the suit for maintenance but before it was decreed, Kesavanand sold the property (which was ultimately charged for the maintenance under the decree) to a third party under whom the appellant before the Supreme Court claimed title. In pursuance of the maintenance charge-decree, the same property was sold in Court-auction in 1928 and the respondent before the Supreme Court claimed title to the property under the said Court-auction. In 1926, that is, after the maintenance charge decree was passed but before the execution sale was held, Kesavanand had been adjudged insolvent. The Supreme Court held that in view of the fact that Kesavanand had executed a private sale of the property even in the year 1920 (during the pendency of the maintenance suit) though that sale is affected by the doctrine of *lis pendens*, there was no property to get vested in the Official Receiver when Kesavanand was adjudged insolvent in the year 1926. Therefore the Supreme Court concluded that the appellants who claimed title to the property under the private sale effected by Kesavanand in the year 1920 had necessarily to fail because that sale is hit by the doctrine of *lis pendens*, and that the respondents who claimed under the execution sale held in pursuance of the maintenance charge decree got good title. The question whether the execution sale was bad on the score that the Official Receiver had not been made a party had been considered only hypothetically. As already mentioned, the finding of the Supreme Court is that the property did not vest in the Official Receiver, the same having been sold away (though hit by the doctrine of *lis pendens*) by Kesavanand even prior to the adjudication. The Supreme Court further observed that even assuming that in spite of the private sale in the year 1920, Kesavanand still had some interest in the property left and that it vested in the Official Receiver, the latter not having elected to exercise his right to question the Court sale, it is not open to attack by the transferee *pendente lite*.

21. Therefore, the observation that the transaction is valid as between the parties to the action made in the above cases cannot be torn out of context, and it is not right to contend in this case that the Court auction sale is binding on the appellant who was no doubt a party to the sale. Once the Official Receiver has elected to exercise

his right, the Court sale ceases to have any effect. Taking a case, where there is no insolvency, a Court sale without notice to the judgment-debtor would certainly be void as against him. But in such a case, if the judgment-debtor never demurs and acquiesces in the Court sale it would not be open to a third party to say that the Court-auction purchaser did not get good title on the score that the judgment-debtor had not been given notice of the execution proceeding. However once the judgment-debtor exercises his option and treats the Court-sale void, then there is no question of the auction purchaser alone being bound by the Court sale on the ground that he was a party to the same. The same principle should apply to the present case also where the Official Receiver is the person who really represented the judgment-debtor on the relevant date. He not having been made a party to the execution proceeding, the sale is void as against him and he can ignore the same. Once he exercises such an option, can it be said that the auction-purchaser being a party to the sale is bound by it? We are of the opinion that in a case where the Official Receiver in whom the property had vested exercises his option, then, the fact that the judgment-debtor was a party to the execution proceedings is of no consequence at all. In such a situation, the Court-auction-sale is just in the same position as one without notice to the judgment-debtor (in a case where there is no insolvency). It is like a third party having been impleaded in the execution proceedings leaving out the judgment-debtor. There can be no doubt that once the Official Receiver in whom the equity of redemption vests exercises his option, the insolvent mortgagor becomes a non-entity, though, however, in a different situation, namely, when the Official Receiver does not exercise his option, the transaction between the mortgagor (judgment-debtor) and the decree-holder would be perfectly valid. As the Supreme Court put it in the case mentioned above at page 603, the purchaser from the insolvent judgment-debtor gets a good and impeccable title subject only to any right which the Official Receiver may so exercise. But as we said, once the Official Receiver elects to exercise his right, the insolvent judgment-debtor becomes a non-entity and he is in the position of a third party who has no interest in the property at all.

22. Mr. Ramachandran, learned Counsel referred to the decision reported in *Muthukumaraswami Pillai* v. *Muthuswami Thevan*[1] and contended that the Court sale in the present case tantamounts to sale of a property to which the judgment-debtor had no title and that the remedy of the auction-purchaser is only to file an application under Order 21, rule 91, Civil Procedure Code, to have the sale set aside. In this connection, the learned Counsel relied upon the observation of Subba Rao, J. (as he then was) in the Full Bench case referred above at page 115, where the learned Judge said that if the property vested in the Official Receiver and sold as if that was the property of the insolvent, the sale would be valid and the judgment-debtor cannot question the validity of the same; and such a sale would be analogous to a sale of the property of a third party as if it was the property of the judgment-debtor. In the course of the judgment, the learned Judge has also referred to *Muthukumaraswami Pillai* v. *Muthuswami Thevan*[1]. The analogy between a sale of a property of a third party as if it was the property of the judgment-debtor and one where the property is vested in the Official Receiver but held without making the Official Receiver a party (and the Official Receiver elects to exercise his right) is only limited. In both the cases, the purchaser does not get title. But while in the case of a property not belonging to the judgment-debtor being sold the sale is not void or one made without jurisdiction, inasmuch as the judgment-debtor is a party to the sale, in the other case, namely where the property vests in the Official Receiver but he is not made a party to the proceeding (and ultimately he elects to exercise his right), that position would be as if, in spite of the judgment-debtor being added as a party to the proceeding, a third party who has no interest in the property is being so added. It is needless to stress that in a case where the pro-

1. (1927) 52 M.L.J. 148: 25 L.W. 232: I.L.R. 50 Mad. 639: A.I.R. 1927 Mad. 394.

perty vests in the Official Receiver (and the Official Receiver elects to exercise his right) the Official Receiver and he alone would be a person representing the interest of the judgment-debtor and the judgment-debtor himself would be a non-entity, or would be in the position of a third party who has no interest in the property.

23. In the present case there is no question of an application under Order 21, rule 91, Civil Procedure Code, for the simple reason, that this is not a case of a property not belonging to the judgment-debtor having been sold. This is a case of sale of the hypotheca and the Official Receiver being bound by the mortgage decree. Even if the adjudication was prior to the mortgage-decree and the Official Receiver had not been made a party to the mortgage suit, still the Official Receiver would be in the position of the mortgagor and any sale by the Official Receiver can only be subject to the mortgage. That is the effect of section 28 (6) of the Provincial Insolvency Act. In this case the adjudication was after the final decree in the mortgage suit and the Official Receiver is bound not only by the mortgage but also by the decree. Admittedly the sale by him was only subject to the said mortgage decree. When the mortgage decree is put in execution and the hypotheca is sold, it is meaningless to say that it is similar to property not belonging to the judgment-debtor having been sold. The learned Counsel, when he contended that in this case the only remedy of the auction-purchaser is to file an application under Order 21, rule 91, Civil Procedure Code, overlooked the fact that the Official Receiver is the real judgment-debtor and the defect in the procedure is only in not making him a party; and it is not a case of the judgment-debtor having been made party but a property not belonging to him having been sold.

24. The Official Receiver being bound by the mortgage decree, the Court-auction-sale without impleading him as a party suffers only from a procedural defect thereby making the sale a void one, the Official Receiver having elected to exercise his right. The Court sale being void as between the Official Receiver and the decree holder auction-purchaser (the mortgagor-judgment-debtor becoming a non-entity) the decree-holder would certainly have a right to bring the property to sale again. Supposing in this case, the Official Receiver had moved the executing Court for a declaration that the sale is void as against him on the ground that he had not been made a party and such an application is allowed as it ought to be, then can it be said that there having been a Court-sale to which the mortgagor was a party, the decree-holder is not entitled to bring the property to sale again?

25. Further in the present case, if instead of bringing the property to sale through Court, the mortgagee decree-holder had taken a private sale of the property in discharge of the mortgage decree from the mortgagor-judgment-debtor, such a transaction would be perfectly valid subject to the right which the Official Receiver may elect to exercise. But if the Official Receiver does elect to exercise his right then the above transaction would be of no avail. Then can it be contended that the mortgagee decree-holder cannot execute the decree and bring the property to sale through Court impleading the Official Receiver? Would the fact that the mortgagee decree-holder had chosen to take a private sale from the judgment-debtor which transaction is of no avail because the Official Receiver exercised his option, debar him from executing the decree and bring the property to sale after making the Official Receiver a party? Surely it would not. The question is whether, instead of there having been a private sale between the decree-holder and the judgment-debtor, there was a Court-sale, would make any difference. We think there could be no difference.

26. The respondent claims title through the Official Receiver. The Official Receiver treats the Court-sale as void. Then the Court sale is void as between the decree-holder and the Official Receiver. It is meaningless to say that it is void as against the Official Receiver but valid as far as the decree-holder is concerned. We have already pointed out that the question of the sale being valid between the judgment-debtor and the

decree-holder as being parties to the transaction, would arise only when the Official Receiver does not elect to exercise his right. Therefore, it is not open to the respondent who claims through the Official Receiver to contend that the Court sale is valid. It was already noticed that in a case where the Official Receiver does not elect to exercise his right, the judgment-debtor himself cannot question the Court sale on the ground that the Official Receiver has not been made a party. Conversely, when the Official Receiver elects to exercise his right and thereby the Court sale is treated as void, then the person who claims through the Official Receiver cannot be heard to say that the Court sale is valid.

27. In *Chandramma* v. *Guna Seelan*[1] which follows *Venkata Reddy* v. *Kunjappa Gounden*[2] the mortgagee filed a suit against a wrong person. Later, a second suit was filed impleading the real owner of the equity of redemption. The question arose whether the second suit would lie. At page 548, column 2 Ananthakrishna Iyer, J., one of the members of the Division Bench which decided the case, *Chandramma* v. *Guna Seelan*[1] observed:

> "The circumstance that the mortgagee filed a suit against a wrong person does not affect the rights of the real owners of the equity of redemption. If it does not affect them at all, one fails to see how they could be heard to say that by virtue of the prior suit which admittedly does not affect them, a (second) suit against them is not maintainable. So far as they are concerned, the second is the only suit against them, and the first suit and the proceedings connected with the same must be taken to be *non est* in the eye of law."

In the present case, when the Official Receiver had not been impleaded as a party to the execution proceedings, but only the judgment-debtor had been impleaded, it must be deemed that the proceedings were against a wrong person, inasmuch as the Official Receiver had elected to exercise his right. That means, the proceedings taken earlier impleading the 'wrong' person are *non est*. We hold that the Court sale is void, that there is no necessity for the same to be set aside under Order 21, rule 91, Civil Procedure Code, that the sale has already been treated as void and all that the executing Court should do is to record that fact, namely, that the sale is void. That means, the part satisfaction recorded should also be treated as cancelled. Accordingly, the Letters Patent Appeal is allowed and the judgment and decree in C. M. S. A. No. 153 of 1966 are set aside and the order of the executing Court confirmed by the first appellate Court, is restored There will be no order as to costs.

28. We would further like to make it clear that the observations of Venkataraman J., in disposing of the civil miscellaneous second appeal, that any fresh execution petition might be time-barred, need not have been made, because that question was not before the learned Judge.

V. K. —— *Appeal allowed.*

1. 61 M.L.J. 316: 133 I.C. 497: A.I.R. 1931 Mad. 542.
2. I.L.R. 47 Mad. 551: 46 M.L.J. 391: 20 L.W. 137: A.I.R. 1924 Mad. 650.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT — *G. Ramanujam and V. Ramaswami, JJ.*

The Pioneer Match Works, Sivakasi and others .. *Petitioners**

v.

The State of Tamil Nadu represented by the Deputy Commercial Tax Officer, Sivakasi, Ramanathapuram District and others. .. *Respondents.*

(A) *Central Sales Tax Amendment Act (XXVIII of 1969), section 10—Exemption under—When can be claimed—Conditions to be fulfilled.*

Section 10 of the Central Sales Tax Amending Act gives the benefit of exemption only to those who have not collected sales-tax on their turnover of inter-State sales or any portion thereof

*T.C. Nos. 196, 197, 225 to 228 and 307 of 1970 and W.P. No. 303 of 1970.
22nd December, 1972.

on the ground that they are not liable to pay tax on such turnover and that under the Central Act before its amendment in 1969 tax could be levied on that turnover. A dealer had to satisfy both the above conditions before he can claim exemption under section 10. Even if it is shown that he had not collected tax on the excise duty on the ground that excise duty is entitled to deduction and not liable to tax, still he will not be entitled to exemption under section 10 if under the Central Act tax is legally payable on the turnover relating to excise duty. [*Para.* 9]

The argument that the question of exemption under section 10 should not be considered in the light of the retrospective amendments brought about by Madras Act III of 1969 and that it should be considered only in the light of the provisions of the Central Act before its amendment and the State Law as it stood on the date of the inter-State sale is untenable. [*Para.* 10]

The contention that it is only the factual existence of the provision for deduction in relation to excise duty under the State law that should be considered and not the fictional non-existence of the provision for deduction as a result of Madras Act III of 1969 is equally untenable. It is a well settled rule of interpretation that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate. [*Para.* 11]

Hence in the present case though factually there was a provision for deduction under the State law and therefore the tax under section 9 of the Central Act could not be levied on the turnover of excise duty on the dates of the assessments, the effect of the subsequent deletion of the provision for deduction under the State law with retrospective effect from 5th January, 1957 by Madras Act III of 1969 is that the provision for exemption should be deemed not to have existed on the date of the assessments. The deeming clause in Madras Act III of 1969 results in the turnover relating to excise duty being taxable from 5th January, 1957 under the State law and consequently the turnover relating to excise duty is also taxable under the Central Act. [*Para.* 10]

(B) *Madras General Sales Tax (Second Amendment) Act (III of 1969)—Validity.*

The contention that the Madras Legislature in enacting Madras Act III of 1969 has attempted to legislate in a way on inter-State sales is not tenable at all. Madras Act III of 1969 is well within the power of the State Legislature to enact a law on sales tax under Entry 54, List II of Schedule VII of the Constitution. In exercise of that power it is always open to the legislature to provide for ancillary or incidental matters. When the legislature withdrew the provision for deduction in the State Act by Madras Act III of 1969 it is not legislating on any inter-State sale which comes under Entry 92-A of List I. The pith and substance of Madras Act III of 1969 cannot be said to relate to inter-State sales. [*Para.* 13]

As regards the attack based on the retrospective nature of Madras Act III of 1969, it is well-established that the legislature is fully competent to make a law with retrospective effect and that a legislation cannot be said to be unreasonable for the only reason that it is retrospective. The mere fact that a legislative provision has been made to operate retrospectively will not make it unreasonable as offending Art. 19 (1) (f) of the Constitution. [*Para.* 14.]

Cases referred to:—

Mariappa Nadar v. *The State of Madras,* (1962) 13 S.T.C. 371: I.L.R. (1962) Mad. 902: (1962) 2 M.L.J. 302: A.I.R. 1962 Mad. 290; *State of Mysore* v. *Mysore Paper Mills,* (1964) 15 S.T.C. 176: A.I.R. 1964 Mys. 212; *Khader and Company* v. *State of Madras,* (1966) 17 S.T.C. 396; *Thirukoilur Oil Mills, Limited* v. *State of Madras,* (1967) 20 S.T.C. 388: (1968) 1, M.L.J. 174: A.I.R. 1968 Mad. 311; *State of Mysore* v. *Yaddalam Lakshminarasimhiah Setty and sons* (1965) 16 S.T.C. 231: (1965) 2 S.C.R. 129: A.I.R. 1965 S.C. 1510; *State of Kerala* v. *Pothan Joseph and sons,* (1970) 25 S.T.C. 147; *Larsen and Toubro case* (1967) 20 S.T.C.

150: (1967) 2 M. L. J., 552: A.I.R. 1968 Mad. 407; *Parvathi Mills case*, (1962) 13 S.T.C. 972; *East End Dwellings Company Limited* v. *Finsbury Borough Council*, (1952) A.C. 109; *Sundaram Industries (P.) Limited, Madurai* v. *State of Tamil Nadu*, (1972) 29 S.T.C. 567; *Krishnamoorthy and Company* v. *The State of Madras*, (1969) 23 S.T.C. 1: A.I.R. 1969 Mad. 265; *J.K. Jute Mills Company Limited* v. *State of Uttar Pradesh*, (1961) 12 S.T.C. 429: (1962) 2 S.C.R. 1: (1963) 1 S.C.J. 127: A.I.R. 1961 S.C. 1534; *M/S. Chhotabhai* v. *Union of India*, A.I.R. 1962 S.C. 1006; *C. Krishnamoorthy* v. *State of Orissa*, (1964) 15 S.T.C. 461: (1964) S.C.D. 771: 30 Cut. L. J. 453: A.I.R. 1964 S.C. 1581; *Mohamed Salam* v. *Commissioner of Commercial Taxes*, (1970) 26 S.T.C. 163.

T.C. Nos. 196, 197, 225 *to* 228 *and* 307 *of* 1970:—

Petitions under section 38 of the Madras General Sales Tax Act, 1969 praying the High Court to revise the Orders of the Court of the Madras Sales Tax Appellate Tribunal (Additional Bench), Madurai dated 21st July, 1969 and passed in Appeal No. 263 of 1968 and dated 8th July, 1969 in Appeal Nos. 2547/67, 2155/67, 2159/67, 2313/67, 537/68 and dated 29th August, 1969 in Appeal No. 300/68 respectively in each of the petitions. (C.S.T. Nos. 73/67, 178/66, 38/67, 61/65, 111/67, 183/67 and 71/67 respectively on the file of the Appellate Assistant Commissioner (C.T.) Ramanathapuram at Virudhunagar.) (C.S.T. Nos. 721/65-66, 721/64-65, 1897/65-66, 726/64-65, 726/65-66, 1736/65-66, 1707/65-66 on the file of the Deputy Commercial Tax Officer, Sivakasi.)

W.P. No. 303 *of* 1970:—

Petition under Article 226 of the Constitution of India paying that in the circumstances stated therein and in the Affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent in his C S.T. No. 1707 of 1965-66 and quash the order passed therein, dated 7th December, 1966 as confirmed by the order of the Appellate Assistant Commissioner (C. T.) Ramanathapuram at Virudhunagar in his Appeal No. CST 71 of 1969 dated 9th November, 1967 as confirmed by the order of the Sales Tax Appellate Tribunal, Madurai in M.T.A. No. 300 of 1968 dated 29th August, 1969.

V. K. Thiruvenkatachari, for *Subbaraya Iyer, Sethuraman* and *Padmanabhan*, for Petitioner in T.C. Nos. 196 and 197 and 307 of 1970 and W.P. No. 303 of 1970.

C. Natarajan, for Petitioner in T. C Nos. 225 to 228 of 1970.

K. Venkataswami, First Assistant Government Pleader on behalf of Respondents in all the petitions.

The Judgment of the Court was delivered by

Ramanujam, J. :—A common question of law is involved in all the above cases and, therefore, they are disposed of together by a common judgment.

2. As the facts in all these cases are substantially the same it is sufficient to set out the facts in T.C. No. 197 of 1970. The petitioner in this case is a partnership firm carrying on business in matches. For the assessment year 1964-65 it had paid a sum of Rs. 1,91,400 as and by way of excise duty to the Central Government on the matches manufactured and sold during that year. The petitioner had claimed a deduction of the aforesaid amount in its returns filed under the Central Sales Tax Act, hereinafter called the Central Act, on the ground that excise duty paid to the Central Government is an allowable deduction under rule 6 (f) of the Madras General Sales Tax Rules, 1959. The assessing authority rejected the petitioner's claim for deduction on the ground that section 9 (3) of the Central Act as it stood originally only attracted the procedure for assessment under the Madras General Sales Tax Act, hereinafter called the State Act, for making the assessments under the Central Act and that as such the exemptions provided under the State Act will not be available in respect of assessments made under the Central Act.

3. Aggrieved against that decision the assessee went on appeal before the Appellate Assistant Commissioner who

held that the petitioner's claim for deduction towards excise duty paid by him in respect of assessments under the Central Act was not tenable in view of the decisions in *Mariappa Nadar* v. *The State of Madras*[1], *State of Mysore* v. *Mysore Paper Mills*[2], *Khader and Company* v. *State of Madras*[3], and *Thirukoilur Oil Mills Limited* v. *State of Madras*[4]. There was a further appeal to the Sales Tax Appellate Tribunal. Before the Tribunal considerable reliance was placed by the petitioner on the decision of the Supreme Court in *State of Mysore* v. *Yaddalam Lakshminarasimhiah Setty and sons*[5] in support of its case that if the excise duty was deductible under the local Sales Tax law in the computation of the taxable turnover, then such duty was also deductible in arriving at the taxable turnover under the Central Sales Tax law. But the Tribunal taking note of the Madras Ordinance 5 of 1968 (replaced by Madras Act III of 1969) which omitted rules 6 (f) of the Madras General Sales Tax Rules, 1959 and 5 (1) (i) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 with retrospective effect from 5th January, 1957 held that in view of the deletion of the provision for deduction from the taxable turnover in relation to excise duty paid by the dealer under the State Act no claim for deduction could be sustained under the Central Act even as per the ruling of Supreme Court in *Yaddalam's case*[5]. The petitioner then relied on section 10 of the Central Ordinance 4 of 1969 which came into force on 9th June, 1969 and claimed that as it has not collected any tax under the Central Act from its customers on the ground that no such tax is leviable on the turnover relating to excise duty, it is entitled to exemption from liability to pay tax in respect of the said turnover. The Tribunal took the view that for claiming exemption under section 10 two essential conditions are to be satisfied, (1) that the dealer should not have collected tax on the ground that tax is not leviable on excise duty and (2) that tax could not have been levied or collected under the principal Central Act before its amendment under Central Ordinance 4 of 1969. On facts the Tribunal found that the Department has not verified whether the petitioner has collected tax or not on the disputed portion of the turnover. However it held that even assuming that the petitioner has not collected tax, still the second condition set out above was not satisfied and, therefore, it is not entitled to the exemption under the said section 10. According to the Tribunal in view of the deletion of the provision for deduction in relation to the excise duty under the State Act, tax could be levied and collected on excise duty under the Central Act even before its amendment by Central Ordinance 4 of 1969 and, therefore, the second condition is not satisfied. In that view the petitioner's appeal came to be dismissed. That view of the Tribunal has been challenged in T.C. No. 197 of 1970.

4. The assessment year and the turnover disputed in each of the above cases are set out below:—

Case No.	*Assessment year.*	*Disputed turnover excise duty*
		Rs.
T.C. 197/70	1964-65	1,91,400.00
T.C. 196/70	1965-66	8,64,637.00
T.C. 225/70	1965-66	45,900.00
T.C 226/70	1964-55	45,900.00
T.C. 227/70	1965-66	1,85,197.00
T.C. 228/70	1965-66	2,63,199.50
T.C. 307/70 and W.P. 303/70	1965-66	2,21,318.00

Except the difference in the disputed turnover, the facts in all these cases are the same.

5. The common question involved in all these cases is as to the true scope of section 10 of the Central Act XXVIII of 1969 which has replaced clause 10 of Central Ordinance 4 of 1969. Before proceeding to consider that question, it is necessary to refer to the changes brought about in the provisions of the State Act as well as the Central Act.

1. (1962) 13 S.T.C. 371: I.L.R. (1962) Mad. 902: (1962) 2 M.L.J. 302: A.I.R. 1962 Mad. 290.
2. (1964) 15 S.T.C. 176: A.I.R. 1964 Mys 212.
3. (1966) 17 S.T.C. 396.
4. (1967) 20 S.T.C. 388: (1968) 1 M.L.J. 174: A.I.R. 1968 Mad. 311.
5. (1965) 16 S.T.C. 231: (1965) 2 S.C.R. 129: A.I.R. 1965 S.C. 1510.

6. We will first refer to the changes brought about in the State Act so far as excise duty is concerned. Under rule 5(1) (i) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 excise duty paid to the Central Government by a dealer in respect of goods manufactured by him is an allowable deduction in the computation of the taxable turnover. The said rules were replaced by the Madras General Sales Tax Rules, 1959, with effect from 1st April 1959. Rule 6 (*f*) of the Madras General Sales Tax Rules, 1959 also allowed a similar deduction in respect of excise duty paid by the dealer. However, the said rule 6 (f) was deleted with effect from 1st April, 1966 by a notification of the State Government in G. O. No. 1041 Revenue, dated 29th March, 1966. Later by the Madras Ordinance 5 of 1968, which came into force on 21st December, 1968, the deletion of rule 6 (*f*) was made retrospective from 1st April 1959. The Ordinance also deleted with retrospective effect rule 5 (1) (*i*) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 from 5th January, 1957 to 31st March, 1959. The above Ordinance has been replaced by Madras Act III of 1969 which came into force on 5th March, 1969. The effect of the change brought about ultimately by Madras Act III of 1969 is that there was no provision for deduction of excise duty paid by a dealer for purpose of determination of his taxable turnover for the period between 5th January, 1957 to 31st March, 1966.

7. So far as the Central Sales Tax Act, 1956, is concerned, section 9 (3) of that Act provided that the assessment and collection of the tax under that Act shall be in the same manner as the tax on the sale or purchase of the goods under the General Sales Tax law of a State is assessed, paid and collected, and for the said purpose, the authorities under the State Act may exercise all or any of the powers they have under the General Sales Tax law of that State. Construing this provision the Supreme Court for the first time in *State of Mysore* v. *Yaddalam Lakshminarasimhiah Setty and sons*[1], held that the expression "in the same manner" occurring in section 9 (3) made it clear that the tax payable by any dealer under the Central Act shall be levied and collected in the same manner as the tax on the sale or purchase of the goods under the General Sales Tax law of a State is assessed and collected and that the expression "levied" occurring in section 9 (1) will have the same meaning as under the local sales tax law. In that case the assessee, a dealer in textiles was taxed on his inter-State sales for the year 1957-58 under section 9 of the Central Sales Tax Act as it stood then. The assessee contended that as he was not the first seller, he is not liable to be assessed under the Mysore Sales Tax Act, 1957 if the sale had taken place in that State and therefore, he could not also be taxed on his inter-State sale under the Central Act. The Supreme Court expressed the view that by virtue of sub-sections 1 and 2 of section 9 of the Central Act, the power conferred upon the authority competent is to assess the tax, in the same manner as the tax on the sale or purchase of the goods under the General Sales Tax law of a State is levied and that it is not intended to make a departure in the manner of levy of tax on specified goods which are taxed only at a single point under the State Act The purport of the above decision is that section 9 of the Central Act not only attracts the machinery provisions under the local sales tax laws but also the substantive provisions relating to the levy and collection of tax In a subsequent decision in the *State of Kerala* v. *Pothan Joseph and sons*[1], their Lordships of the Supreme Court specifically considered the question whether the excise duty which is an allowable deduction under the local sales tax law would also be a deduction under the Central Act by virtue of section of that Act. The Supreme Court, following the decision in *State of Mysore* v. *Yaddalam Lakshminarasimhiah Setty and sons*[2], specifically held that the general sales tax law of a State, which would include the rules framed thereunder governed the levy and assessment of the tax in the matter of inter-State sales and, therefore, a dealer who is entitled to deduction towards excise duty in deter-

1. (1965) 2 S.C.R. 129: (1965) 16 S.T.C. 231: A.I.R. 1965 S.C. 1510.

1. (1970) 25 S.T.C. 147.
2. (1965) 2 S.C.R. 129: 16 S.T.C. 231: A.I.R. 1965 S.C. 1510.

mining the total turnover for the purpose of the State Act will be equally entitled to claim deduction in respect of such excise duty in relation to the inter-State sales in determining the turnover for the purposes of the Central Act.

8. Till the above decision in *Pothan Joseph's case*[1], was rendered by the Supreme Court, this Court had taken a consistent view that the phrase "in the same manner" in section 9 (3) did not attract all the incidents of the local sales tax law to the assessments under the Central Act, that what was contemplated was that the procedure for making an assessment, collection of tax etc., should be the same as laid down in the local sales tax law, and that as such it was only the machinery and the procedural provisions of the local law which were made applicable by section 9 (3) of the Act. *Mariappa Nadar* v. *State of Madras*[2], is one of the earliest decisions rendered before *Yaddalam's case*[3], *Khader and Company* v. *State of Madras*[4] and *Larsen and Toubro case*[5] and *Tirukoilur Oil Mills case*[6], are all decisions rendered by this Court after the decision of the Supreme Court in *Yaddalam's case*[3] and in all these decisions this Court has taken the view that the decision in *Yaddalam's case*[3], will not have any application to the question of deductions and that unless there is a specific provision for deduction in the Central Act or the rules framed thereunder, no deduction could be claimed under that Act. The Kerala High Court took the same view in *Parvathi Mills case*[7]. The Mysore High Court in *Mysore Paper case*[8], also took the same view. It is at this stage the Central Ordinance 4 of 1969 came to be promulgated on 9th June, 1969, with retrospective effect from 1st October, 1959, amending section 9 so as to give effect to the views expressed in the above decisions of this Court and other High Courts, and to supersede the decisions of the Supreme Court in *Yaddalam's case*[1] and *Pothan Joseph's case*[2]. This Ordinance has been replaced by Central Act XXVIII of 1969. Section 9 as amended only attracts the machinery provisions of the local sales-tax laws and not the substantive provisions such as the point or stage of levy, exemption, deductions, etc. The result is a claim for deduction towards excise duty based on a provision under the local sales tax law, in respect of the Central sales tax assessment cannot be sustained as at present and that excise duty becomes taxable under the Central Sales Tax Act from 1st October, 1959. But as a new liability has been created by a retrospective amendment of section 9, the Parliament has enacted section 10 of the Central Act XXVIII of 1969 providing for exemption from sales tax liability in case the dealer effecting inter-State sale has not colleted any tax under the Central Act before its amendment on the ground that no such tax could be levied or collected in respect of such sale or any portion of the turnover relating to such sale and no such tax could be levied or collected under the Central Act before its amendment.

9. The petitioners do not dispute that under section 9 as amended they are liable to pay tax on the turnover relating to excise duty. But what they contend is that they are entitled to exemption from tax on the said turnover in view of the exemption contained in the said section 10. Section 10 of the amending Act gives the benefit of exemption only to those who have not collected sales tax on their turnover of inter State sales or any portion thereof on the ground that they are not liable to pay tax on such turnover and that under the Central Act before its amendment tax could be levied on that turnover. A dealer had to satisfy both the above conditions before he claims exemption under section 10. Even if it is shown that he had not collected tax on the excise duty on the ground that excise duty is entitled to dedution and not

1. (1970) 25 S.T.C. 147.
2. (1962) 13 S.T.C. 371: (1962) 2 M.L.J. 302.
3. (1965) 16 S.T.C. 231: (1965) 2 S.C.R. 129: A.I.R. 1965 S.C. 1510.
4. (1966) 17 S.T.C. 396.
5. (1967) 20 S.T.C. 150: (1967) 2 M.L.J. 552: A.I.R. 1968 Mad. 407.
6. (1967) 20 S.T.C. 388: (1968) 1 M.L.J. 174.
7. (1962) 13 S.T.C. 972.
8. (1964) 15 S.T.C. 176: A.I.R. 1964 Mys. 212.

1. (1965) 2 S.C.R. 129: 16 S.T.C. 231.
2. (1970) 25 S.T.C. 147.

liable to tax, still he will not be entitled to exemption under section 10 if under the Central Act, tax is legally payable on the turnover relating to excise duty. Therefore, for applying section 10 it has to be seen as to what is the law in force on the date of the final assessments in these cases.

10. Mr. V. K. Thiruvenkatachari, the learned Counsel for some of the petitioners contends that the question of exemption under section 10 should not be considered in the light of the retrospective amendments brought about by Madras Act III of 1969, that it should be considered only in the light of the provisions of the Central Act before its amendment, and the State law as it stood on the date of the inter-State sale and that as the petitioners have not collected tax on the turnover representing excise duty on the ground that they are not liable to be taxed on that turnover and that section 9 of the Central Act as it stood then and as interpreted by the Supreme Court did not enable the tax to be levied on such turnover, they are entitled to the exemption under the section. Section 9 provided that the tax payable under the Central Act shall be levied and collected by the Central Government in the same manner as the tax under the local sales tax law is assessed and collected. Section 9 as understood by the Supreme Court in *Yaddalam's case*,[1] and *Pothan Joseph's case*[2] also attracted the provisions of the State Act relating to exemption and deduction etc. Though factually there was a provision for deduction under the State law and, therefore, the tax under section 9 of the Central Act could not be levied on the turnover of excise duty on the dates of the assessments, the effect of the subsequent deletion of the provision for deduction under the State law with retrospective effect from 5th January, 1957 is that the provisions for exemption should be deemed not to have existed on the date of the assessments. The deeming clause in Madras Act III of 1969 results in the turnover relating to excise duty being taxable from 5th January, 1957 under the State law and consequently the turnover relating to excise duty is also taxable under the Central Act. The contention of the learned Counsel that the amendments brought about in the local sales tax law in relation to the deduction of excise duty should not be construed in such a way as to affect the charge under the Central Act is not possible of acceptance. Section 9 of the Central Act in the form it was at the relevant time attracted the provisions of the local sales tax law in general. The section does not refer to the provisions of the local Sales Tax Act as they existed on the date when the Central Sales Tax Act was enacted. Therefore, the scope of the charge under section 9 of the Central Act as it then stood cannot be considered independent of the changes made in the provisions of the State law. It is said that the Parliament when it enacted the Central Act could have had in view only the provisions of the State law as they existed on 5th January, 1957, when the Act came into force and that in any event, it cannot be deemed to have adopted the provisions of the local law which did not actually exist at the time. We are not concerned here with the propriety of Parliament in enacting section 9 in the form it was before its amendment in 1969 for none of the petitioners has questioned the validity of section 9 on the ground either of excessive delegation of legislative power to or of abdication of the same in favour of the local legislatures. We are only concerned in the interpretation of section 9 as has been enacted by Parliament. We are unable, therefore, to ignore the amendments brought about by Madras Act III of 1969 deleting the provision for deduction of excise duty from 5th January, 1957 while construing the scope of section 9 as it existed before 1969.

11. We are also not inclined to accept the contention of the learned Counsel that it is only the factual existence of the provision for deduction in relation to excise duty under the State law that should be considered and not the fictional non-existence of the provision for deduction as a result of Madras Act III of 1969 It is a well-settled rule of interpretation that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate. If the

1. (1965) 2 S.C.R. 129: 16 S.T.C. 231.
2. (1970) 25 S.T.C. 147.

statute says that you must imagine a certain state of affairs, you must not cause or permit your imagination to boggle when it comes to the inevitable corrollaries of that state of affairs. (*Vide* the observations of Lord Asquith in *East End Dwellings Company Limited* v. *Finsbury Borough Council*[1]. The effect oft he retrospective deletion of the provision for deduction of excise duty in the State Act is as if there was no such provision after 5th January, 1957.

12. The learned Counsel then urged that normally a retrospective amendment of the existing statute is resorted to only when the amendments proposed are either declaratory or clarificatory or to remove a defect found or difficulty arising out of the working of the statute sought to be amended, that a retrospective amendment cannot be resorted to impose a fresh levy of tax only for an anterior period without any impact on future transactions and that, therefore, Madras Act III of 1969 more or less bringing to charge the turnover relating to excise duty for an anterior period between 5th January, 1957 to 31st March, 1967 is invalid in law. According to the learned Counsel, the object of bringing in this amending legislation by the Madras Legislature was only to disable the dealers from getting the benefit of exemption under section 10 of the Central Act XXVIII of 1969 and such an object clearly shows that the Madras Legislature has, in substance and effect, legislated with respect to inter-State sales which are admittedly outside its legislative powers and in any event, Madras Act III of 1969 in so far as it withdraws the provision for deduction for an anterior period should be taken to be unreasonable and violative of Article 19 (1) (*f*) of the Constitution.

13. As regards the contention that the Madras Legislature in enacting Madras Act III of 1969 has attempted to legislate in a way on inter-State sales is not tenable at all. Madras Act III of 1969 is well within the power of the State Legislature to enact a law on sales tax under Entry 54, List II of Schedule VII of the Constitution. In exercise of that power it is always open to the legislature to provide for ancillary or incidental matters. It can provide for exemption deduction etc., or withdraw the same in its discretion, and the wisdom of the legislature in permitting exemptions and deductions or in withdrawing the same cannot at all be questioned. When the legislature withdrew the provision for deduction in the State Act by Madras Act III of 1969 it is not legislating on any inter State sale which comes under Entry 92-A of List I in Schedule VII. The pith and substance of Madras Act III of 1969 cannot be said to relate to inter State sales. The fact that it has an impact on the law made by the Parliament, will not affect the power of the State legislature to enact a law with reference to an entry exclusively falling within its legislative competence. The impact on the Central Act was only due to a provision made in the Central Act itself attracting the provisions of the State Act and not as a result of a provision made by the State legislature. The following dicta of Veeraswami, C.J., in *Sundaram Industries (P.) Limited, Madurai* v. *State of Tamil Nadu*[1] is in point:

> "So long as the Legislature is within the limits of its power under the entry, neither its exercise in a particular manner nor the policy which has dictated it can successfully be questioned. Within the field of power earmarked for it under the Constitution, the State Legislature is supreme, except to the extent of limitations envisaged under the Constitution. Having regard to the nature of the power, each entry should be read and understood in its widest and most comprehensive sense. The power to legislate on any of the matters enumerated in the list, includes the power to make provisions to cover ancillary or incidental matters."

It is not, therefore, possible to say that Madras Act III of 1969 in any way trenches on the Central field.

14. As regards the attack based on the retrospective nature of Madras Act III of 1969, it is well established that the legislature is fully competent to make a law with retrospective effect and that a legislation cannot be said to be unreasonable for the only reason that it is retrospective. The mere fact that a legislative provision has been made to operate

1. (1952) A.C. 109.

4. (1972) 29 S.T.C. 567.

retrospectively will not make it unreasonable as offending Article 19 (1) (*f*) of the Constitution. In this case it is true the concession which was in vogue practically from 1st April, 1939 had been withdrawn for the period from 1st April, 1957 to 31st March, 1966 by a retrospective legislation made in the year 1969. But that fact alone cannot make the amending Act unreasonable There is always a presumption in favour of the constitutionality of a statutory provision and to strike it down as being unreasonable and as offending Article 19 (1) (*f*) of the Constitution, it must be shown, that the operation of the retrospective legislation will result in taking away the right guaranteed under Article 19 (1) (*f*) and that it is not a reasonable restriction coming under Article 19 (5). The withdrawal of the concession might have been thought of as necessary in view of the Supreme Court judgment in *Taddalam's case*[1]. If the power of the legislature to enact a law with retrospective effect cannot be questioned, the mere fact that the withdrawal of the concession with retrospective effect will result in certain dealers being exposed to an additional burden will not make the legislation unreasonable. As pointed out in *Krishnamoorthy and Company* v *State of Madras*[2], it is well-established that the power of the legislature in a taxation entry is plenary and it includes the power to legislate prospectively as well as retrospectively. No question of legislative competency of an enactment can arise merely on the ground of its retrospective effect in taxation. The inhibition of *ex post facto* laws does not apply to imposition of taxes by retrospective legislation, but if the retrospectivity is in its effect confiscatory or operates as a cloak for an oblique legislative purpose removed from ostensible tax considerations or is so totally oppressive as might destroy the very source of taxation, it may be regarded as unreasonable. The above decision has been affirmed by the Supreme Court in C.A. Nos. 471 to 474 of 1969. In *J. K. Jute Mills Company Limited* v. *State of Uttar Pradesh*,[3] it has been held by the Supreme Court that it would be competent to a Legislature to impose a tax on sales which had taken place prior to the enactment of the legislation. In *M/s. Chhotabhai* v. *Union of India*[1], it was held that mere retrospectivity in the imposition of a tax could not *per se* render the law unconstitutional on the ground of its infringing the right to hold property under Article 19 (1) (*f*) or on the ground that it was unreasonable because it deprived a citizen of his right to pass on the tax to others. In *C. Krishnamoorthy* v. *State of Orissa*[2], the Supreme Court observed :

> "It is true that in considering the question as to whether legislative power to pass an Act retrospectively has been reasonably exercised or not, it is relevant to enquire how the retrospective operation operates. But because the retrospective operation may operate harshly in some cases, it cannot be said that the legislation itself is invalid."

15. We find that the very same amending Act, Madras Act III of 1969, was under attack in *Mohamed Salam v. Commissioner of Commercial Taxes*[3], and it had been clearly held that Madras Act III of 1969 is not confiscatory and is not relative of Article 19 (1) (*f*) of the Constitution. A similar view has also been taken by Ramaprasada Rao, J. in *The Pioneer Match Works, Sivakasi* v. *Deputy Commercial Tax Officers and others*[4], Ramaprasada Rao, J. has also considered the tenability of the identical contentions as have been put forward before us, and the learned Judge, if we may say so with respect, has considered the matter in some detail and has ultimately rejected the contentions. Construing the scope of section 10 of Central Act XXVIII of 1969 the learned Judge has expressed :

> "To claim or to qualify to claim that concession the section prescribes three conditions, namely: (1) the dealer should not have collected tax, (2) that such non-collection must be in the belief that no such tax could have

1. (1965) 2 S.C.R. 129: 16 S.T.C. 231.
2. (1969) 23 S.T.C. 1: A.I.R. 1969 Mad. 265.
3. (1961) 12: S.T.C. 429: (1962) 2 S.C.R. 1: (1963) 1 S.C.J. 127: A.I.R. 1961 S.C. 1534.

1. A.I.R. 1962 S.C. 1006.
2. (1964) 15 S.T.C. 461: (196) S.C.D. 771: 30 Cut. L.T. 453: (1964) 7 S.C.R. 185: A.I.R. 1964 S.C. 1581.
3. (1970) 26 S.T.C. 163.
4. W.P. No. 74 of 1970.

been levied or collected in respect of such sa e or any portion of the turnover re ating to s ch sa'e; and (3 no such ta< cou d have been le ied or co ected if the amendments made in the principa' Act by Centra' Act XXVIII of 1969 had not been made."

U timate'y it was he d that the petitioner in T.C. No. 179 of 1970 who was a so the petitioner before the earned J dge in that writ petition is not entit ed to c aim exem tion nder section 10 as a conjoint reading of section 9 of the Central Act and the ro isions of the State Act as amended b Madras Act III of 1969 makes the osition c ear that the Central Act before its amendment by Central Act XXVIII of 1969 enab'ed the ta< to be levied on e cise d ty. With res ect we entire'y agree with the reasoning of Ramaprasada Rao, J. in that case. We ha e to, therefore, ho d that Madras Act III of 1969 does not s ffer from any of the infirmities pointed o t by the learned Co nsel for the assessee and that the assessee is not entit ed to the bene it of exem tion nder section 10 of Central Act XXVIII of 1969.

16. The result is all the Tax Cases and the writ petition are dismissed with costs. Counsel's fee Rs. 100 in each case.

V.K. —— *Tax Cases and Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam and S. Maharajan, JJ.*

Thilagavathi and others .. *Appellants**

v.

Sundaram and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 95(1) *and section* 110—*Tractor accident—Tractor owned by father—Son, driver at the time of accident—Tractor insured by owner—Insurance po y section* 2, *cl.* (3)—*When liability arises—Insurer not liable.*

Under section (2) cl. 3 of the Insurance Policy the insurer was liable indemnify anv driver, and that stipulation to indemnify was subject to the terms and limitations contained in the policy. If the driver had committed any tortious act against a third party he would be under the law of torts equally with the master, liable for damages caused to the third party and in such a case the insurer might have been held to have contracted to indemnif the driver. But in the instant case the driver had not committed any tortious act against an third party. Before making the insurer liable it was necessar for the claimants to rove that the insured had become legall liable to pa an compensation in respect of the deceased. The insured would be legally liable if the deceased had been his employee. He may also be legally liable if he had committed a tortious act against a third party. [*Para.* 7]

In the present case, it was held that the deceased was not the emplo ee of the ins red and therefore the question of vicarious liability would not arise. [*Para.* 7]

Appeal against the order of the Motor Accidents Claims Trib nal (Additional District J dge), Salem dated th J ly, 1972 and made in M.A.C.A. No. 9 of 1970

A. Devanathan, for Appellants.

K. C. Jacob and *S. K. L. Ratan* and *S. Narayanaswamy*, for Respondents.

The Judgment of the Court was delivered by

Maharajan, J.— This is an appeal against the order of the Motor Accidents C aims Tribuna', Sa em dismissing a c aim made under section 100-A of the Motor Vehicles Act for compensation of Rs. 50,000 for the death of one K. S. Loganathan in a tractor accident. The accident took p'ace on 2'st October, 1969, whi e Loganathan was ploughing his mother's and with the tractor, owned b his father S ndaram and ins red by him with the Life Insurance Cor oration of India. The claimants, who are the widow, da ghter and mother of the deceased, al eged in the petition that, without any rashness or neg igence on the part of Loganathan, the vehic'e turned turtle suddenly at 1 P. M. on the date in question, with the res lt Loganathan fell down and was crushed to death b the tractor. It was a eged in the petition that the accident was due to mechanical defect in the vehic'e. Sundaram the father of the deceased, remained *ex parte.*

* A. A. O. No. 258 of 1973. *25th April.* 1974.

2. The Insurance Company filed a counter raising several objections, one of which was that the accident had been brought about by the rashness and negligence of Loganathan, who was driving the tractor. The other contention was that the accident had taken place in a private land and the petition was not therefore maintainable under section 95 (1) read with section 2 (24) of the Motor Vehicles Act. Objections were raised to the maintainability of the petition before the Claims Tribunal on the ground that the petition would lie under the Workmen's Compenation Act before the Commissioner and not before the Claims Tribunal.

3. The Tribunal negatived the case of the claimants that the deceased was an employee of his father, Sundaram and consequently, dismissed the claim made by the appellants.

4. Learned Counsel for the appellants contends that the finding of the Tribunal that the deceased was not an employee of his father is wrong and that the evidence on record ought to compel the Court to conclude that the deceased was really an employee of his father and that compensation ought to have been granted by the Tribunal under the Workmen's Compensation Act.

5. We have been taken through the entire evidence on record and we see little reason to differ from the finding of the Tribunal.

* * * * *

(The discussion on facts is omitted—Ed.)

6. It would then follow that the dependants of the deceased Loganathan would not be entitled to compensation under the Workmen's Compensation Act.

7. Learned Counsel next endeavoured to show that the terms of the insurance policy do cover a risk of the kind that has occurred. Reference is made by him to clause 3 of section 2 of the insurance policy, Exhibit B-1, which says as follows:

"In terms of and subject to the limitations of the indemnity which is granted by this section to the insured the Corporation will indemnify any driver who is driving the motor vehicle on the insured's order or with his permission, provided that such driver,

(a) is not entitled to indemnity under any other policy.

(b) shall as though he were the insured observe, fulfil and be subject to the terms, exceptions and conditions of this policy in so far as they can apply".

What this clause says is that the insurer will indemnify any driver and that stipulation to indemnify is subject to the terms and limitations contained in section 2 of the policy. If the driver had committed any tortious act against a third party, he would be, under the law of torts, equally with the master, liable for damages caused to the third party. In such a case, the insurer might be held to have contracted to indemnify the driver. But, in this case, the driver of the tractor did not commit any tortious act against any third party. No question, therefore, of indemnifying either the driver or his master, could arise. Further, the conditions laid down in section 2 are stated in clause I, the relevant portion of which is as follows :

"Subject to the limits of liability, the Corporation will indemnify the insured against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of (i) death of or bodily injury to any person............"

Before making the insurer liable, it is necessary for the claimants to prove that the insured has become legally liable to pay any compensation in respect of the deceased. The insured would be legally liable if the deceased had been his employee. He may also be legally liable if the deceased had committed a tortious act against third parties. But in this case, we have found that the deceased was not the employee of the insured. The case of the claimants themselves is that the deceased was not guilty of rashness and negligence and did not commit any tortious act. It would, therefore, follow that no foundation has been laid for the vicarious liability of the insured.

8. It is unnecessary for us in this appeal to consider the merits of the other objections raised by the Insurance Company before the Tribunal.

9. Upon the finding recorded above we have no option but to dismiss this appeal, but, in the circumstances, without costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT:—*M. M. Ismail, J.*

R. Thirumoorthy .. *Petitioner**

v.

The Collector, Coimbatore and others .. *Respondents.*

Tamil Nadu Cinema Regulation Rules—Rule 45—No objection certificate—Application for—Objection by petitioner—Certificate granted—Appeal by objector—Rejected as time-barred—Mere knowledge of the order, whether sufficient—Constitution of India, Article 226.

Rule 45 of the Tamil Nadu Cinema Regulation Rules provides for a period of thirty days from the date of the receipt of the copy of the order for filing an appeal. When a copy of the order was not received by the petitioner, the period of limitation should be calculated from the date when he came to 'know' of the order of the Collector granting 'no objection certificate'. [*Para.* 4]

On the facts, Held, that the petitioner knew that 'no objection certificate' was issued to the respondent and he had knowledge of the contents of the order of the Collector and he did not file an appeal in time and the Board of Revenue was correct in dismissing his appeal as timebarred and the writ petition was dismissed. [*Para.* 5]

Cases referred to:—

Raja Harish Chandra Raj Singh v. The Deputy Land Acquisition Officer and another, (1962) 1 S.C.J. 696: (1962) 2 An.W.R. (S.C) 10: (1962) 2 M.L.J. (S.C) 10: (1962) 1 S.C.R. 676: A.I.R. 1961 S.C. 1500; *State of Punjab v. Mst. Qaisar Jehan Beham,* (1964) 1 S.C.J. 33: (1964) 1 M.L.J. (S.C.) 9: (1964) 1 An.W.R. (S.C.) 9: (1964) 1 S.C.R. 971: A.I.R. 1963 S.C. 1604.

Petition under Article 226 of the Constitution of India, praying that, in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the proceedings of the 1st Respondent issuing the no objection certificate in Form B and confirmed by the order of the 2nd respondent made in B. P. Rt. No. 2089/74 dated 18th April, 1974 and quash the same.

(*S. Ramachandran,* for Petitioner.)

S. Ramalingam. Assistant Government Pleader and *K. Padmanabhan,* for Respondents.

The Court made the following

ORDER:—The third respondent herein applied for the grant of a 'no objection certificate' on 11th June, 1973 and the same was granted by the Collecter of Coimbatore by order dated 1st September, 1973. Meanwhile, the petitioner sent an objection petition to the Collector which was received by the Collector on 2?th July, 1973. From the order of the Board of Revenue in this case it is clear that after receipt of the objection-petition, the same was not traceable in the office of the Collector and consequently the Collector proceeded to grant the 'no-objection certificate' to the third respondent as if there were no objections. On 22nd March, 1974, the petitioner preferred an appeal to the Board of Reveune, and the Board of Revenue, by their order dated 18th April, 1974, rejected the appeal as time-barred. It is to quash this order of the Board of Revenue this writ petition under Article 226 of the Constitution of India has been filed.

2. The Board of Revenue took the view that since the petitioner's objection-petition was not in the file of the Collector, the Collector was not bound to send a copy of his order granting the 'no objection certificate' to the third respondent, to the pettioner herein, and consequently the period of limitation of thirty days prescribed by rule 45 of the Tamil Nadu Cinema Regulation Rules should be calculated from the date of the order itself and therefore the appeal filed on 22nd March, 1974, *i.e.*, more than six and a half months after the grant of the 'no objection certificate, was barred by limitation.

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*W. P. No. 991 of 1974. 10*th July,* 1974.

3. In my opinion, though the reasoning of the Board of Revenue is erroneous, their conclusion that the appeal was barred by limitation is correct. When the objection petition was actually received by the Collecter, if the same was subsequently not traceable in his office, a person like the petitioner, who had sent the objections, ought not to be penalised for any inefficiency or slackness in the office of the Collector. Consequently it could not be said that because the petitioner's objection-petition was not in the file of the Collector the petitioner was not entitled to a copy of the order of the Collector.

4. However, the real question for consideration is whether the appeal filed by the petitioner before the Board of Revenue was barred by limitation, or not. As I pointed out already, the appeal was filed on 22nd March, 1974. Rule 45 of the Tamil Nadu Cinema Regulation Rules provides for a period of thirty days from the date of receipt of the copy of the order for filing an appeal. When the copy of the order was not received by the petitioner, the period of limitation should be calculated from the date when he came to 'know' of the order of the Collector granting 'no objection certificate' to the third respondent on the basis of the principles laid down by the Supreme Court in *Raja Harish Chandra Raj Singh* v. *The Deputy Land Acquisition Officer and another*[1]. In this case on 31st January, 1974, the petitioner has filed an objection-petition to the Collector when the third respondent had applied for the grant of a 'C-form licence'. In that objection-petition, the petitioner stated as follows:—

> "It is respectfully submitted that I had already submitted a valid objection even at the time of issue of 'no-objection certificate' for locating touring cinema on the above site, but due to the inspecting officers not properly submitting their remarks regarding the surrounding existences around the space of the touring cinema, my objection was not upheld, and the no-objection certificate has now been granted, and application for C-form licence is said to have been presented. I have valid objections against the grant of the C form licence under rule 103 (3) of the Tamil Nadu Cinema Regulation Rules which runs as under..."

It is thus clear that on 31st January, 1974 itself the petitioner was aware of the grant of the 'no objection certificate' to the third respondent and thereafter he objected to the grant of the 'C-form licence'. Consequently, the period of limitation provided for under rule 45 must be calculated at least from this date. If so, the appeal filed on 22nd March, 1974 would clearly be time-barred.

5. The learned Counsel for the petitioner, however, wanted to contend that the mere knowledge on the part of the petitioner of the fact that the Collector issued the 'no-objection certificate' to the third respondent was not enough and that the petitioner should have known the contents of the order. In my opinion, having regard to the circumstances of this case, such a contention is untenable. The remedy that was available to the petitioner was by way of appeal. Nothing prevented him to file an appeal to the Board of Revenue putting forward the very same objections which he filed before the Collector, to challenge the order of the Collector granting the 'no objection certificate'; and he not having done so, it is not now open to him to contend that though he knew of the grant of the 'no objection certificate', he did not know the contents of the order of the Collector, and, therefore, he could not prefer the appeal in time. From his objections dated 31st January, 1974 it is clear that the petitioner knew that his objections were overruled and 'no-objection certificate' was granted to the third respondent. Thus, the petitioner, had knowledge of the essential contents of the order of the Collector, within the principles laid down by the Supreme Court in *State of Punjab* v. *Mst. Qaisar Jehan Begum*[1]. Consequently, for different reasons, the conclusion of the Board of Revenue that the appeal of the

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1. (1962) 1 S.C.J. 696: (1962) 2 An.W.R. (S.C.) 10: (1962) 2 M.L.J. (S.C.) 10: A.I.R. 1961 S.C. 1500.

1. (1964) 1 S.C.J. 33: (1964) 1 M.L.J. (S.C.) 9: (1964) 1 An.W.R. (S.C.) 9: (1964) 1 S.C.R. 971: A.I.R. 1963 S.C. 1604.

petitioner preferred before them on 22nd March, 1974 was barred by limitation is correct.

6. The writ petition is dismissed. No costs.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Natarajan, JJ.*

M/s. Seth Nanak Chand Shandurain, manufacturers, importers and stockists doing business at No. 68/69, Sembudoss Street, Madras-1 .. *Appellant* *

v.

The Tinnevelly-Tuticorin Electric Supply Company Limited, Calcutta represented by power agent and Resident Engineer V. Srinivasan, T. T. E. and Company Limited, High Road, Tirunelveli .. *Respondent*

Contract Act (IX of 1872), section 28—Civil Procedure Code (V of 1908) section 21—Contract relating to jurisdiction—"All dealings subject to Madras jurisdiction" meaning of—Place of sutng—No objection in the Court of first instance—Whether can be raised at appellate stage.

A marked distinction exists between cases in which Courts lack jurisdiction to try the cases and where jurisdiction is irregularly exercised by Courts. In the former case the Court ought not to have entered upon trial of the suit, in the latter it could have avoided trial, but necessarily not. Competency of a Court to try an action goes to the root of the matter and when such competence is not found it has no jurisdiction at all to try the case. But objection based on jurisdiction is a matter which parties could waive and it is in this sense if such jurisdiction is exercised by Courts, it does not go to the core of it so as to make the resultant judgment a nullity. Equally well-settled is the proposition that where there are two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen within the jurisdiction of each of these Courts, parties to the concerned, transaction can contract to vest jurisdiction in one of such Courts to try disputes which might arise as between themselves. If such a contract is clear, unambiguous, not vague and explicit, it is not hit by section 28 of the Contract Act. This should not be understood as parties contracting against statute. But this is one of many series of contracts available in mercantile practice and forged in the name of commercial expediency. [*Para.* 5]

If the parties, at the inception applied their mind and chose one of the competent Courts as the Court in which disputes have to be adjudicated and decided upon and if such a consensus is demonstrable in a given case, Courts ought not to be astute to find a different contract between the parties.

The word 'Madras' in the popular sense may geographically mean the original civil Courts in the State of Madras. This may be obvious in cases where the defendant contracts with a party outside the State of Madras. If a particular dealing is not inter-State but intra-State, it is difficult to hold that there has been such a deliberate attempt on the part of the parties when the contract was entered into so as to exclude the jurisdiction of all the civil Courts in the State of Madras excepting that in the Madras City. [*Para.* 12]

The first part of section 21, Civil Procedure Code, is its prudential content whilst the later part of it sets out the guidelines on which the appellate or revisional Court should act. If by an act or omission or commission the defendant in a particular cause having raised the plea as to jurisdiction and particularly an objection as to the place of suing participates in the trial Court, does not even ask for trial of the issue on such jurisdiction as a preliminary issue, and being aware of the framing of such an issue does not press for it in a manner known to law but allows the trial to go on in the usual course on all the issues, he is bound by his own conduct. He should be deemed in such circumstances to have waived his objection as to jurisdiction. He cannot risk a full trail with bald chance of success on merits Having so risked and

*Appeal No. 92 of 1968. 18th *January* 1974.

having had the benefit of a full trial, it is unreasonable to hold that he is prejudiced at the end of the trial if he finds his cause unsuccessful before the trial Court. A litigant is expected ordinarily to be aware of his legal rights as *ignorantia juris is neminem excusat*. Such knowledge and awareness includes his right to press for a decision on his objection as to place of suing which is obviously a contractual right and seek for a trial of a cause by the agreed competent Court. He should be alert as to press for such a decision at the appropriate time before the forum in which, according to him, the *lis* has been wrongly instituted and thus avoid prejudice on all sides to all parties. If he does not, he cannot at the appellate stage approbate and reprobate and attempt to reopen a rather closed issue and avoid the assailing of the general verdict on merits. It is this essential feature in such a subject-matter that is brought out in the second part of section 21, Civil Procedure Code, which lays down as a requirement in law that unless there has been a consequent failure of justice, a litigant should not be encouraged to raise the objection as to the place of suing at the appellate or revisional stage, since such objection, though taken in the Court of first instance, was not pressed to its normal end. In fact, the guidelines in section 21 make it imperative that such an objection has to be raised at the earliest possible opportunity and in all cases where issues are settled at or before such settlement.

[*Para.* 13]

Cases referred to:—

Achmatlal Kesavlal Mehta and Co. v. *Vijayam and Company*, (1925) 49 M.L.J. 189: 22 L.W. 70: 90 I.C. 1019: A.I.R. 1925 Mad. 1145; *Hoosen Kasam Dada (India) Ltd.*, v. *Motilal Padampat Sugar Mills Company Ltd.*, (1954) 1 M.L.J. 434: 67 L.W. 36: I.L.R. (1954) Mad. 855: A.I.R. 1954 Mad. 845; *Patel Brothers* v. *Vadilal Kashidas Ltd.*, (1959) 1 M.L.J. 106: A.I.R. 1959 Mad. 227; *Hemchandra Sahu* v. *M/s. Sirdarlal Kerimall and Company*, C. R. P. No. 1010 of 1953; *P. H. Sanghvi* v. *Asher Textiles Ltd.*, (1961) 2 M.L.J. 337: 74 L.W. 333; *Melur G. Venkatappa and sons, Shimoga, Mysore* v. *T. V. Ramalingam Pillai and sons*, (1973) 32 S.T.C. 274; *Jhumwala Brothers* v. *N. K. M. Subbaramier*, (1967) 1 M.L.J. 299: I.L.R. (1968) 1 Mad. 640: 80 L.W. 93: A.I.R. 1968 Mad. 194; *Kiran Singh* v. *Chaman Paswan*, (1955) 1 S.C.R. 117: 1954 S.C.J. 514: A.I.R. 1954 S.C. 340; *Jagan Mohan Rao* v. *Swarun*, (1972) 2 M.L.J. 77: 85 L.W. 484.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin dated 31st August, 1967 in O. S. No. 26 of 1966.

T. Raghavan and *T. K. Seshadri*, for Appellant.

M. R. Narayanaswamy and *R. Srinivasan*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The defendant in O.S. No. 26 of 1966 on the file of the Court of the Subordinate Judge, Tuticorin, is the appellant. The plaintiff respondent filed the suit alleging that it paid in excess to the defendant in the course of certain supplies of R. S. Joists for which orders were placed by the plaintiff with the defendant. It also included in the claim a sum of Rs. 210-70 towards demurrage charges which the plaintiff is said to have incurred due to the default on the part of the defendant, as also a sum of Rs. 410-41 towards bank charges which expense was also attributable to certain laches on the part of the defendant. It is common ground that under Exhibit A-29 dated, 17th June, 1963, the defendant supplied towards order No. 1716/GL/2 dated 14th December, 1961, placed by the plaintiff 265 pieces of R. S. Joists untested of a particular specification as detailed in the invoice and charged a sum of Rs. 31,861-17 as their price which included transporting and delivery charges. Again, under Exhibit A-30 dated 29th June, 1963, 188 of such pieces were supplied by the defendant pursuant to the same order as above. In the invoices as above the defendant claimed that the joists were of a measurement of 5 inches × 3 inches whilst the plaintiff's case is that the joists were of a dimension of 125 × 75 m.m. Under Exhibits A-5 and A-7 the plaintiff made

it clear that it has paid as claimed by the defendant in their invoices Exhibits A-29 and A-30 but that on later verification it was found that the R. S. Joists applied by the defendant was of the dimension 125 m.m. × 75 m.m. and not 5 inches × 3 inches as billed by the defendant. As the price of the materials supplied has to be worked out on the weight and as a result of the misdescription as to the dimension of the joists, the weight mechanically was put up higher resulting in excess charging of the price for the materials supplied. The plaintiff made this position clear by comparing the weight of the materials supplied with the railway weight as per the railway receipt and claimed under those exhibits a refund of the excess sums so paid. Incidentally it may be stated that there was another consignment which also suffered the same mistake and discrepancy and when a claim was made for refund of the excess price paid by mistake, the defendant, without any demur, refunded the same. As regards the two consignments which were the subject-matter of invoices Exhibits A-29 and A-30 towards which refunds of the excess price paid were claimed by the plaintiff under Exhibits A-5 and A-7 the defendant, in response to an express demand made for such a refund under Exhibit A-11 wrote to the plaintiff under Exhibit A-13 *inter alia* stating "We have given instructions to our Accounts Department to refund the amount". In spite of the circumstances as above the defendant would not refund the excess price paid. This resulted in the plaintiff issuing the suit notice Exhibit A-23 dated 4th September, 1964. It was confronted with a reply Exhibit A-24 dated 3rd October, 1964 whereunder the defendant repudiated liability to refund the amount claimed. The plaintiff has therefore come to Court claiming a sum of Rs. 6,556-78 being the excess price paid towards the supplies covered by invoice Exhibit A-29 and sum of Rs. 4,912-18 towards such excess price covered by the invoice Exhibit A-30. The plaintiff also included in the plaint two other claims, one for Rs. 210-70 representing the demurrage charges incurred by it on account on the negligence of the defendant, and the other for Rs. 410-41 towards bank charges. In the written statement the defendant raised the contention that under the express terms of the contract the dispute in respect of the said contract shall be adjudicated by the Courts at Madras alone and that therefore, the Subordinate Judge, Tuticorin, before whom the suit was instituted, had no jurisdiction to try and adjudicate upon it. But without prejudice to the above contention as to jurisdiction, the defendant, on merits denied their liability to refund the alleged excess price paid, as also their liability towards demurrage and banking charges. The learned Subordinate Judge framed the following issues:

"1. Whether the cause of action arose at Tuticorin and this Court has jurisdiction to entertain the suit?

2. Whether the entire cause of action arose within the local limits of the jurisdiction of the civil Courts in Madras and this Court has no jurisdiction to entertain the suit?

3. Whether the agreement alleged in para. 2 of the written statement is true and this Court's jurisdiction is excluded thereby?

4. Whether there was excess billing for the supplies made by the defendant and the defendant is liable for the amounts claimed in that regard?

5. Whether the defendant is liable for demurrage and bank charges?

6. To what relief, if any, is plaintiff entitled?"

After hearing the oral evidence and after considering in detail the documentary evidence filed on either side, the learned Subordinate Judge decreed the suit for a sum of Rs. 11,679-66 with proportionate costs disallowing the sum of Rs. 410-41 claimed by the plaintiff as bank charges. The defendant has come up to this Court in appeal after having participated fully in the trial in the lower Court.

2. Mr. T. Raghavan, learned Counsel for the appellant, was unable to impress upon us that the findings of the lower Court on merits ought to in any way be disturbed. As a matter of fact, under

Exhibit A-13 the defendant practically agreed to refund the suit amount and their prior conduct in refunding such excess paid in connection with an earlier supply also fortifies the case of the plaintiff that they did pay the price in excess of the price of the goods to which the defendant was lawfully entitled. As no person can unjustly enrich himself due to a mistake whether wanton or otherwise, made by him in the course, of dealings by him with another and as the weight of the Joists has been wrongly calculated in the invoices, we have no hesitation to hold that the plaintiff is entitled to the refund of the excess price of the goods sold and delivered to it by the defendant as found by the trial Court.

3. As regards the claim for demurrage which was allowed by the Court below, no serious argument had been addressed before us. The disallowance of bank charges is not the subject-matter of any cross appeal either. We are, therefore, sustaining the judgment of the Court below on merits.

4. But the more important question raised by Mr. T. Raghavan, learned Counsel for the appellant is that parties having contracted specifically to vest jurisdiction to decide dispute relating to the relative sales and purchases of goods in the course at Madras, the Court at Tuticorin had no jurisdiction to entertain the suit, and much less to decide on it. The relevant portion of the contract which is reflected in the conditions of sale agreed to between the parties reads thus:

"All dealings are subject to Madras jurisdiction". On the basis of the text of such a special clause in the agreement of sale it was contended that there is an exclusion of jurisdiction of all Courts, including the Court at Tuticorin and as such the judgment appealed against is a nullity and is without jurisdiction. What was urged before us is that when the parties have so specifically agreed to have all matters decided in Madras, there is no option left to the plaintiff to choose the Court at Tuticorin though it might otherwise be a competent Court under the provisions of the Civil Procedure Code that being the place of performance of contract. Mr. M. R. Narayanaswami, on the other hand, contended that not only the Court at Tuticorin is a competent Court to entertain the *lis* but for the special clause, as above, but when the defendant had submitted himself to the jurisdiction of that Court and went to trial on the merits he is prevented from raising the question of jurisdiction in this Court and set at nought the considered judgment rendered by the trial Court on merits.

5. A marked distinction exists between cases in which Courts lack jurisdiction to try the cases and where jurisdiction is irregularly exercised by Courts. In the former case the Court ought not to have entered upon trial of the suit; in the latter it could have avoided trial, but necessarily not. Competency of a Court to try an action goes to the root of the matter and when such competence is not found it has no jurisdiction at all to try the case. But objection based on jurisdiction is a matter which parties could waive and it is in this sense if such jurisdiction is exercised by Courts, it does not go to the core of it so as to make the resultant judgment a nullity. Equally well settled is the proposition that where there are two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen within the jurisdiction of each of these Courts, parties to the concerned transaction can contract to vest jurisdiction in one of such Courts to try disputes which might arise as between themselves. If such a contract is clear, unambiguous, not vague and explicit, it is not hit by section 28 of the Contract Act. This should not be understood as parties contracting against statute. But this is one of many series of contracts available in mercantile practice and forged in the name of commercial expediency.

6. However, invariably, the whole question resolves itself into one of fact. If the parties at the inception applied their mind and chose one of the competent Courts as the Court in which disputes have to be adjudicated and decided upon, and if such a consensus is demonstrable in a given case, Courts ought not to be astute to find a different contract between the parties. I shall presently refer to

the decided cases which touch upon the instant subject-matter.

7. In *Achmatlal Kesavlal Mehta and Company* v. *Vijayam and Company*[1], Madhavan Nair, J., had to consider a clause which read that "In all legal disputes arising out of the contract, Ahmedabad will be understood as the place where the cause of action arose." The verb used is 'will' which has therefore to be interpreted literally. The learned Judge therefore held:

> "Where there are two Courts both of which would normally have jurisdiction to try a suit, an agreement between the parties that the suit should be filed in one of those Courts alone and not in the other does not contravene the provisions of the Contract Act ......I do not think that the term is void, beca se it means that all suits in respect of the contracts should be brought at Ahmedabad only and not at Madras, I do not think it is void, because the Ahmedabad Court is also a Court which would normally have jurisdiction to entertain those suits, ..."

In *Hoosen Kasam Dada (India), Limited* v. *Motilal Padampat Sugar Mills Company Limited*[2], Rajamannar, C.J., presiding over the Division Bench, approved of the above principle and held that a stipulation that all disputes in respect of the contract shall be settled by arbitration, failing which, shall be settled in the Court of seller's jurisdiction where this contract shall be deemed to have been entered into, cannot be said to be opposed public policy. This is also authority for the proposition that if there is a voluntary agreement to oust the jurisdiction of all other compentent Courts excepting one, then it is a perfectly legal and an enforceable contact.

8. Reference was also made to two decisions rendered by Ramachandra Iyer, J., as he then was, sitting singly and presiding over a Division Bench as well. In *Patel Brothers* v. *Vadilal Kashidas Limited*[1] the exhibit with which the learned Judge was concerned was a printed bill in which there was a printed clause at the top which contained the words "subject to Bombay jurisdiction". It was fo ind there that beyond filing the said contract, no other evidence was let in, in the case to prove that s ch a sti ulation was entered into vo untari y and that the parties applied their minds at the time when they forged such a contract. The learned Judge, therefore, distinguished *Hoosen Kasam Dada (India) Limited* v. *Motilal Padampat Sugar Mills Company, Limited*[2] and relied upon the decision of Ba akrishna Iyer, J., in *Hemchandra Sahu* v. *Messrs. Sirdarlal Keraimall and Company*[3] and he d that such a contract containing a printed cla se as above cannot be interpreted to mean that the jurisdiction of all other Courts is excluded. The learned Judge was of the view that s ch a cla se cannot also amount to a contract between the parties agreeing to have Bombay as the venue for settling disputes. Apparently this case was decided on its own merits and on the singu ar fact that there was no evidence to show that the parties voluntarily agreed to the exclusion of competent Courts than the Courts at Bombay.

9. Even so *P. H. Sanghvi* v. *Asher Textiles Limited*[4] was decided on its merits. That was a case where the clause in the contract stipulated that all proceedings in respect of it shall be taken in a Court of original jurisdiction in Tirupur and it so happened that only a District Munsif's Court existed at that place with limited pecuniary jurisdiction of the said Court which will be outside the purview of the clause. Such a clause, Ramachandra Iyer, J., as he then was, speaking for the Bench said, cannot be interpreted to mean any Court having original jurisdiction over Tirupur, such as the Sub-Court at Coimbatore. He continued and said that the general rule of construction of a written contract is that its language should be understood in its

1. (1925) 49 M.L.J. 189: 22 L.W. 70: A.I.R. 1925 Mad. 1145: 90 I.C. 1019.
2. (1954) 1 M.L.J. 434: 67 L.W. 36: I.L.R. (1954) Mad. 855: A.I.R. 1954 Mad. 845.

1. (1959) 1 M.L.J. 106: A.I.R. 1959 Mad. 227.
2. (1954) 1 M.L.J. 434: 67 L.W. 36: I.L.R. (1954) Mad. 855.
3. C.R.P. No. 1010 of 1953.
4. (1961) 2 M.L.J. 337: 74 L.W. 333.

ordinary and natural meaning even though such a construction may not carry out the purpose, which the parties may be supposed to have intended. He concluded by saying that it will not, however, be open to the parties, by an agreement, to vest jurisdiction in a Court which it did not possess and deprive the only Court of the jurisdicion which it has.

10. Ramanujam, J., no doubt, followed the ratio in *Patel Brothers* v. *Vadilal Kashidas Limited*[1] in a decision of his reported in *Melur G. Venkatappa and sons, Shimoga, Mysore* v. *T. V. R. Ramalingam Pillai and sons*[2]. There also the learned Judge who spoke for the Bench was considering a printed clause on the reverse of an invoice which was to the effect that all claims and disputes arising out of the transaction are subject to the jurisdiction of the Court at Shimoga. Apparently the learned Judge was of the view that there was no further evidence to show that the parties were made aware at all of the existence of that clause in the invoice. It is in that context that the learned Judge preferred the decision of Ramachandra Iyer, J., as he then was, in *Patel Brothers* v. *Vadilal Kashidas Limited*[1] and accepted the distinction drawn by him to the ratio in *H. K. Dada (India) Limited* v. *Motilal Padampat Sugar Mills Company*[3]

11. But Alagiriswami, J., in *Jhun Jhunwala Brothers* v. *N.K.M. Subbaramier*[4] had occasion to interpret a contract containing the clause. "This order is subject to confirmation by the works at Barang, South Eastern Railway, and shall be considered as having been made at Barang and subject to the jurisdiction of Cuttack Courts only, placing strong reliance upon the words 'only' and invoking the principle in *Achratlal Kesavalal Mehta and Company* v. *Vijayam and Company*[5] and *Hoosen Kasam Dada (India), Limited* v. *Motilal Padampat Sugar Mills Company Limited*[1] the learned Judge held:

> "It will be noticed that in the present case the ouster of jurisdiction is specifically made a term of the contract and the contract also says that the contract shall be subject to the jurisdiction of Cuttack Courts only"

and upheld the principle that it is only the Cuttack Courts that will have jurisdiction to entertain the suit even though part of the cause of action had arisen within their jurisdiction.

12. In the instant case the term of the contract, as already stated, was "all dealings are subject to Madras jurisdiction." Even assuming that there was *consensus ad item* between the parties as to the place where causes have to be brought, since it forms part of the contract itself it is for consideration as to how the specific terms can be worked out and enforced. The plaintiff is in the State of Madras. The defendant also is in the State of Madras No particular or specific forum is agreed upon. The terms as to ouster of jurisdiction in the present case is vague and not unambiguous. (The word "Madras" in the popular sense may geographically mean the original civil Courts in the State of Madras. This may be obvious in cases where the defendant contracts with a party outside the State of Madras. If a particular dealing is not inter-State but intra-State, as in this case, it is difficult to hold that there has been such a deliberate attempt on the part of the parties when the contract was entered into so as to exclude the jurisdiction of all the civil Courts in the State of Madras excepting that in the Madras City. The patent, ambiguity in the terms of the contract considered in the light of the situs of trade of the parties in this case, prompts us to hold that it cannot be said that there has been an ouster of jurisdiction of the Court at Tuticorin and that there has been a demonstrable consensus between the parties to vest jurisdiction only in Courts in the City of Madras. Even assuming

1. (1959) 1 M.L.J. 106: A.I.R. 1959 Mad. 227.
2. (1973) 32 S.T.C. 274.
3. (1954) 1 M.L.J. 434: 67 L.W. 36: I.L.R. (1954) Mad. 855.
4. (1967) 1 M.L.J. 299: 80 L.W. 93: I.L.R. (1968) 1 Mad. 640: A.I.R. 1968 Mad. 194.
5. (1925) 49 M.L.J. 189: 90 I.C. 1019: 22 L.W. 70: A.I.R. 1925 Mad. 1145.

1. (1954) 1 M.L.J. 434: 67 L.W. 36: I.L.R. (1954) Mad. 855.

that Mr. Raghavan's contention is well-founded that the parties agreed by choice to invoke the jurisdiction of the Madras City Courts only, the argument of Mr. M.R. Narayanaswami is that such a technical plea as to ouster of jurisdiction ought not to be entertained at the appellate stage when the defendant did not express any such anxiety whilst the case was tried by the trial Court at Tuticorin.

13. We are of the view that the contention of Mr. M.R. Narayanaswami is well-founded. Section 21 of the Civil Procedure Code runs as follows:

> "No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instances at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice."

It speaks of a rule of prudence as well as a rule of guidance. (The first Part of section 21 is its prudential content whilst the later part of it sets out the guidelines on which the appellate or revisional Court should act. If by an act of omission or commission the defendant in a particular cause having raised the plea as to jurisdiction and particularly an objection as to the place of suing participates in the trial Court, does not even ask for trial of the issue on such jurisdiction as a preliminary issue, and being aware of the framing of such an issue dose not press for it in a manner known to law but allows the trial to go on in the usual course on all the issues, he is bound by his own conduct. He should be deemed in such circumstances to have waived his objection as to jurisdiction. He cannot risk a full trial with bald chance of success on merits. Having so risked and having had the benefit of a full trial, it is unreasonable to hold that he is prejudiced at the end of the trial if he finds his cause unsuccessful before the trial Court. A litigant is expected ordinarily to be aware of his legal rights as *Ignorantia juris is neminem excusat*. Such knowledge and awareness includes his right to press for a decision on his objection as to place of suing which is obviously a contractual right and seek for a trial of the cause by the agreed competent Court. He should be alert as to press for such a decision at the appropriate time before the forum in which, according to him, the *lis* has been wrongly instituted and thus avoid prejudice on all sides to all parties. If he does not, he cannot at the appellate stage approbate and reprobate and attempt to re-open a rather closed issue and avoid the assailing of the general verdict on merits. It is this essential feature in such a subject-matter that is brought out in the second part of section 21, Civil Procedure Code, which lays down as a requirement in law that unless there has been a consequent failure of justice, a litigant should not be encouraged to raise objection as to the place of suing at the appellate or revisional stage, since such objection, though taken in the Court of first instance, was not pressed to its normal end. In fact, the guidelines in section 21 make it imperative that such an objection has to be raised at the earliest possible opportunity and in all cases where issues are settled at or before such settlement. A hesitant attempt, no doubt, was made in the Court below as issues 1, 2 and 3 have been so expressly framed. In spite of this the plaintiff was not diligent to pursue the issues in the appropriate manner and in a manner known to law, but suffered ultimately a judgment against him. In these circumstances it cannot be said that there has been a consequent failure of justice within the meaning of the last paranthetical clause in section 21, Civil Procedure Code.

14. In *Kiran Singh v. Chaman Paswan*[1] the Supreme Court laid down the salient principle thus:

> "The policy underlying section 11 of the Suits Valuation Act, as also of sections 21 and 99 of the Civil Procedure Code is that when a case has been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed merely on technical grounds unless a failure of justice has resulted. The policy of the legislature has been to treat objections as to jurisdiction, both territorial and pecuniary, as

1. 1954 S.C.J. 514: (1954) 2 M. L. J. 60: (1955) 1 S.C.R. 117: A.I.R. 1954 S.C. 340.

technical and not open to consideration by an appellate Court, unless there has been prejudice on the merits."

The Supreme Court, thus, has characterised an objection as to territorial jurisdiction as technical and if no concrete proof is available as to the resultant prejudice caused to the complaining litigant he ought not to be encouraged to reiterate the same plea and raise objection as to territorial jurisdiction in the appellate stage.

15. In *Jagan Mohan Rao* v. *Swarun*[1] Ramanujam J., after referring to the decision of the Supreme Court as above, observed that in such cases the appellant having allowed the lower Court to proceed to decide on the merits of the case and taken a chance of having a decision in his favour from the lower Court, is prevented from raising the question of jurisdiction at the appellate stage.

16. Having regard to the express conduct of the appellant and as on merits he was unable to challenge the findings of the Court below and as in our view the appellant has not been prejudiced in the least by the trial of the case by the Subordinate Judge, Tuticorin, we are unable to accept it and allow the technical objection as to territorial jurisdiction at this stage. The appeal, therefore, fails and is dismissed with costs.

R. S. ——— *Appeal dismissed.*

1. (1972) 2 M.L.J. 77: 85 L.W. 484.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Appellate Jurisdiction)

PRESENT:—*K. Veeraswami, C. J.*, and *S. Natarajan, J.*

N. Swaminathan .. *Appellant**

v.

The District Revenue Officer, Salem and others .. *Respondent.*

Tamil Nadu Land Reforms (Fixation of Ceiling) Act, 1961—Object—Section 73—Scope—Meaning of "to hold" and "held by the Government as lessee"—Whether excluded from the provisions of the Act—Acquisition and Re-acquisition Act XLII of 1956—Applicability.

The provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling) Act read with the preamble to that Act, would show that when land in excess of the ceiling area is notified and taken over for the definite purpose of distributing the same to the landless poor and when the land is not available for the purpose on its being held by Government for a seed farm, section 73 (i) will make the entire Act inapplicable to it. [*Para.* 5]

The object of the Act, as adumbrated in the preamble thereto is to reduce the disparity in the ownership of agricultural land in the State, acquire such land in excess of the ceiling area and distribute the same to the landless and other persons among the rural population. [*Para.* 2.]

If the definition of the word "to hold" is spilt up, it will be seen that there are four classes of cases, where a person can be said to hold land—(1) where he owns land as owner, (2) he possesses or enjoys land as possessory mortgagee, (3) as tenant and (4) as intermediary. Any person who possesses or enjoys in one or more of these capacities will come within the scope of the definition. [*Para.* 2.]

When the land is held by Government as a lessee, and the same is used by it

*W.A. Nos. 408 and 409 of 1971. *25th June, 1974.*

for the purpose of the lease, in such a case no question of taking over the excess and distributing the same to the landless poor would arise. [*Para.* 3]

So long as the land requisitioned under Act XLII of 1956 was held by Government and the same was not released from the provisions of the Act, the Ceiling Act could not properly be applied to it, for in that case there is no question of ceiling and taking over the surplus for the purpose of distribution to the poor. The two Acts serve different purposes and will have to be applied in accordance with the intention of each of the Acts. [*Para.* 6.]

Appeals under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Palaniswamy dated 22nd October, 1970 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 3168/67 and 3402/69 respectively presented under Article 226 of the Constitution of India to issue Writs of (1) *certiorari* calling for the records relating to the notification of the third respondent herein, dated 8th November, 1965, published in *Fort St. George Gazette* (Extraordinary) as item 111 No. 508 of 1965 and quash the same (in W.P. No. 3168/67) and (2) *mandamus* directing the Government to award just compensation of the market value of the land after calling for the records relating to the order of the District Revenue Officer, Salem in ROC. B. 4 3176/66 dated 29th March, 1967 and the connected G. O. Ms. No. 3141 dated 2nd September, 1966, Agricultural Department, State of Madras (in W.P. No. 3402/69).

A. R. Ramanathan, for Appellant.

The Government Pleader, for Respondent

The Judgment of the Court was delivered by

Veeraswami, C. J.—These are appeals from a combined order of Palaniswami, J. The appellant who is common to both the appeals, owned about 110.90 acres of land in Danishpet Village, Omalur Taluk, Salem District. The extent was requisitioned and taken possession of by the State Government on 18th March, 1960, under the provisions of Act XLII of 1956. The relevant notification for taking over the land was on 15th October, 1959. The land had since been developed as a seed farm. While the Government was in possession admittedly as a lessee, the Ceiling Act came into force with effect from 6th April, 1960. There were proceedings under this Act based on returns filled by the appellant. On 25th April, 1963, an extent of 70 acres 18 cents was declared to be surplus. The proceedings continued and reached the stage of a notification dated 5th November, 1967, under section 18 (1). Eventually, a draft compensation order was sent to the appellant on 24th November, 1967. It was mentioned that the appellant had not taken objection to any of the steps leading to the draft compensation order. With reference to the balance of 40 acres found to be within the ceiling are with the appellant, proceedings again under Act XLII of 1956 were initiated and, on 2nd March, 1967, the compensation payable for this extent was notified. At that stage, the appellant intervened and objected on 28th April, 1976, to the proceedings and wanted arbitration to be applied. He also wanted compensation for the extent of 70 acres 18 cents under the provisions of Act (XLII of 1956, Palaniswamy, J., declined to quash the notification of the third respondent dated 8th November, 1965 and the order of the District Revenue Officer, Salem, dated 29th March, 1967 and the connected G. O. M. S. No. 3141 dated 28th September, 1966. There was also a prayer in one of the petitions before the learned Judge for *mandamus* directing the Government to award just compensation on the market value of the land.

2. The argument for the appellant centres round the scope of section 73 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. It is said that because the entire extent was held by the State Government as a lessee, the Act itself would be inapplicable to the land. There was, therefore, neither any obligation on the part of the appellant to make return; nor was there any

power in the Authorised Officer to proceed to declare the ceiling area and also the surplus land and take over the same. In order to appreciate this argument, it is necessary to see the definition of the words 'to hold'. Section 3 (19) defines the words "to mean to own land as owner or to possess or enjoy land as possessory mortgagee or as tenant or as intermediary or in one or more of these capacities". If the definition is split up, it will be seen that there are four classes of cases where a person can be said to hold land—(1) Where he owns land as owner, (2) he possesses or enjoys land as possessory mortgagee, (3) as tenant and (4) as intermediary. Any person who possesses or enjoys in one or more of these capacities will come within the scope of the definition. The definitions will govern interpretation of the provisions of the Act unless the context otherwise requires. That statement is found at the opening of section 3. Section 2 which was repealed by Tamil Nadu Act XXXVII of 1972 and substituted by a new section, provided before its amendment that subject to the provisions of section 6, nothing contained in the Act shall apply to lands held by religious trusts of a public nature. So far as private trusts are concerned, they are covered by section 6 which applies the Act to lands held in such trusts. Section 5 (1) prescribes the ceiling area. Sub-section (2) of that section directs that for the purpose of ceiling, lands held individually by the members of a family or jointly by some or all of the members of such family shall be deemed to be held by the family. The next sub-section by two clauses gives directions to calculate the extent of land held by a member of a family or individual person. Section 7 declares that on and from the date of the commencement of the Act, no person shall except as otherwise provided in the Act, but subject to the provisions of Chapter VIII, be entitled to hold land in excess of the ceiling area. Be it noted at this stage that this section is merely declaratory and does not vest all surplus lands in the Government. Then follows a number of provisions for working out the ceiling area and declaring surplus lands. Appeals and revisions are also provided at various stages before reaching the notification under section 18 (1). Once a notification is made under section 18 (3), the land declared to be in surplus shall vest in the Government free from all encumbrances and all right, title and interest of the persons in such land shall, with effect from the date of notification, be deemed to have been extinguished. Then we have Amending Act XXXVII of 1972. But we need not consider its provisions, as they are not relevant to the present appeals. Chapter III deals with ceiling on future acquisition and restriction on certain transfers, Chapter VI with compensation, Chapter VII with survey and settlement of lands in the transferred territory and Chapter VIII with cultivating tenant's ceiling area. Then we come to Chapter IX in which exemptions are mentioned. Chapter XII deals with penalties and procedure. Chapter XIV contains miscellaneous provisions. Section 94 in Chapter XIII deals with disposal of land acquired by the Government, that is to say, under this section. Subject to the provisions of sub section (2) of section 5 the Government may, after taking into consideration the objects specified in the preamble, make rules providing for the manner in which any land acquired by the Government under the Act shall be disposed of. The object of the Act, as adumbrated in the preamble thereto, is to reduce the disparity in the ownership of agricultural land in the State, acquire such land in excess of the ceiling area and distribute the same to the landless the other persons among the rural population. We have broadly surveyed the provisions of the Act and mentioned the preamble thereto merely for the purpose of better appreciating the scope of section 73. That section contains a number of exemptions. It opens by saying that except as otherwise provided in sub sections (2) and (3) of section 5 and in section 6, nothing contained in the Act shall apply to a number of things. Stopping there for a moment we may observe, that the *non obstante* clause does not need to be considered by us, as it has no significance so far as these appeals go in the interpretation to be placed on clause (*i*) of the section. It says that nothing contained in the Act shall apply to "any land held by the Central Government or any State Government or any local authority". Similarly, the Act will have no application under clauses (*ii*) and (*iii*) to any land held by charitable or

educational institution of public nature, any trust, any university constituted by any law and by co operative society. Before clause (ii) was amended the Act was not applicable to any land held by any industrial or commercial undertaking under clause (iv). The Act will have no application to plantations in existence. So also it will have no application to any land used exclusively for growing fuel trees. Lands converted on or before July 1, 1959, into orchards or topes or arecanut gardens, whether or not such lands are contiguous or scattered, are not attracted by the provisions of the Act. It is noteworthy that Gramdan land and land donated for purposes of the Bhoodan Yagna will not be affected by the Act. Any land interspersed among plantations or contiguous to any plantation is not affected by the provisions of the Act. The policy behind these exemptions, broadly speaking, appears to be that, where a public purpose is served from the standpoint of agricultural requirement or land is used as orchard, or tope or arecanut garden or the land is used exclusively for growing fuel trees for distributing to the poor as in the case of Gramdan land, the provisions of the Act are not attracted. Consistent with the definition of the words "to hold land", any land held by the State Government for the purposes of section 73 would include land held by it as lessee.

3. The crucial question is whether there is anything in the context in any of the provisions of the Act to exclude from the scope of section 73(i) land held by Government as a lessee or as a tenant. In our opinion, having regard to the object contained in the preamble, it will be reasonable to hold that lands held by individuals or joint families in excess of the ceiling area which can be taken over and distributed to the landless poor in order to avoid concentration of agricultural holding, will be within the purview of the Act. But, when land is held by Government as a lessee, and this is admitted, and the same is used by it as seed farm, we do not see why such lands should be excluded form section 73 (i). So long as Government holds it for the purpose of seedbed under that arrangement, no question of taking over the excess and distributing the same to the landless poor would arise.

4. It is strenuously argued for Government that the definition of the expression "to hold" should not be literally applied in construing the scope of section 73 (i). Learned Government Pleader says that the appellant, as owner, holds the land and, therefore, he is obliged to file a return and subject himself to the provisions of the Act. But we do not think that this approach is correct. The obligation to file a return arises when the person holds land in the definition sense. But, so far as section 73 (i) is concerned, the exemption is based on the character of the land. The exemption applies to land of a particular category, in the instant case to land held by the State Government whether as owner or as mortgagee or as tenant. To such land none of the provisions of the Act, including the provision which would otherwise oblige an individual to file a return, will apply. The other contention of the learned Government Pleader is that if section 73 (i) is construed as making differentiation between an individual who holds land and the Government it may be discriminatory and such interpretation may not normally be placed on this provision. Here again we are unable to agree with him. No discrimination would arise, because when land is held by Government as in this case for a seed farm, it serves a public purpose and such land is not available for distribution to the landless poor. So long as it is used as seed bed, the provision will not be hit by the inhibition against discrimination.

5. The provisions of the Act which we have set out at the outset of the judgment, when they are read with the object mentioned in the preamble to the Act, would show that when land in excess of the ceiling area is notified and taken over for the definite purpose of distributing the same to the landless poor and when the land is not available for the purpose on its being held by Government for a seed farm, section 73 (i) will make the entire Act inapplicable to it.

6. For the appellant it was rightly contended that the method applied by

Government in acquiring this land does not appear to be proper. So long as the land requisitioned under Act XLII of 1956 was held by Government and the same was not released from the provisions of the Act, the Ceiling Act could not properly be applied to it, for in that case there is no question of ceiling and taking over the surplus for the purpose of distribution to the poor. In fact, we are not able to visualise how in such a case the appellant could surrender the excess over the ceiling area. If the Government wanted to apply the Ceiling Act, the right and proper thing they have to do is to have released the land from the provisions of Act XLII of 1956. In the instant case while the land was still under requisition, to part of the land which is within the ceiling area the provision of the Requisition and Acquisition Act was applied and to the surplus, the Ceiling Act was applied. In adopting this proeedure, we are inclined to think that the authority apparently designed to short-circuit the entire matter without keeping in mind that the two Acts serve different purposes and will have to be applied in accordance with the intention of each of the Acts. It is not a matter of convenience or expediency, but is a question of proper application of the statutory provisions in order to achieve the desired result, namely, the Government continuing in possession and using the land as a seed farm.

7. On that view of the matter, we allow the appeals. No costs.

R. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*Mr. G. Ramanujam* and *Mr. V. Ramaswami, JJ.*

A. Rangaswami Pillai .. *Appellant.**

v.

A. Subramania Pillai and others. .. *Respondents.*

Indian Evidence Act (I of 1872), section 32 (7) and section 13—Statement contained in deed—Admissibility—Indian Trusts Act (II of 1882), section 82—Presumption of advancement—Proof of due execution of will—Indian Succession Act, section 63 (c).

Under clause (7) of section 32 of the Evidence Act a statement made by a person, which is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (*a*), is a relevant fact and therefore admissible in evidence. The phrase "which relates to any such transaction" in section 13 qualifies the word "statement" in clause (7) of section 32. [*Para.* 3.]

In Indian Law the English rule as to presumption of advancement has not been adopted. Section 82 of the Indian Trusts Act recognises that money might have been contributed by another towards a purchase with the intention of giving the beneficial interest to the person in whose name the purchase is made. The fact to be proved being a positive issue that the person intended to give the consideration to benefit the transferee, the issue cannot be put in the negative form so as to make the person who provided the consideration to show that he did not intend to provide such consideration for the benefit of the transferee. [*Para.* 4.]

Under section 63 (*c*) of the Indian Succession Act, proof of due execution of a will requires that either one or more of the attesting witnesses should prove the execution by the testator and the attestation by each of them. [*Para.* 6.]

A document may fail as a will for want of proof of due execution as provided

*Appeal No. 589 of 1968. *13th March*, 1974.

under section 63 (*c*) of the Indian Succession Act. But still, if the signature of the executant is true, it would be a document signed by that person, though it would not have the effect of a will. The statement in such a document would be statement made by a deceased person relating to a transaetion as is mentioned in section 13, clause (*a*), of the Evidence Act. The recitals in the document itself could be relied on except for the purpose of claiming title under the same. [*Para.* 7]

Cases referred to :—

Chittaluri Sitamma and another v. *Saphur Sitapati Rao and others*, I. L. R. (1938) Mad. 220: (1937) 2 M. L. J. 606: A. I. R. 1938 Mad. 8. *Roda Framross* v. *Kanta Varjivandas*, A. I. R. 1946, Bom. 12.

Appeal against the decree of the Court of the Subordinate Judge, Thanjavur in Original Suit No. 30 of 1966 dated 30th January, 1968.

K. Sarvabhauman and *T. R. Mani*, for Appellant.

G. Narayanan, K. V. Prakash, S. Narayanan, K. Raman and *C. L. Vijayaraghavan*, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.— The second defendant is the appellant. The first respondent-plaintiff filed a suit for partition and allotment of 1/3 share in the suit properties which consisted of six schedules. The suit was decreed only in respect of the plaint A-schedule properties and even in respect of the same the plaintiff was held to be entitled only to a 1/4 share and not 1/3 share as claimed in the plaint. The suit in respect of the properties mentioned in the other schedules was dismissed. Since in this appeal by the second defendant, the decree granted in favour of the plaintiff in respect of item-1 of the plaint A schedule alone is disputed, we need notice only the facts relating to that item and the respective contentions of the parties.

2. The plaintlff, defendants 1 and 2 and one Chockalingam Pillai are the sons of one Arthanatha Pillai through his third wife. He had a son by name Soundararajan by his first wife and another son by name Mathuranayagam by his second wife. On 22nd August, 1921 (Exhibit B-52), item-1 of the plaint A-schedule was purchased in the name of Nagammal, the third wife of Arthanatha Pillai. Arthanatha Pillai executed a Will (Exhibit A-1) dated 13th July, 1927, and died in the year 1928. Under this Will he treated the property purchased in the name of his third wife Nagammal as his self-acquired property and made certain bequests in respect of the same, which will be noticed in detail while considering the respective cases of the parties. Nagammal died on 18th December, 1961, leaving a Will dated 15th July, 1953 (Exhibit B-2). Under this Will, she purported to deal with this item of property as if it was her own and in respect of which she had absolute powers of disposition. The case of the plaintiff was that this item is the self-acquired property of his father Arthanatha Pillai, and that under his Will (Exhibit A-1) dated 13th July, 1927, he is entitled to a 1/3 share. It was stated that Chockalingam Pillai, one of the sons of Arthanatha, relinquished his rights in respect of the same under Exhibit A-10 dated 21st April, 1937 and that therefore his legal representatives, defendants 14 to 16, are not entitled to any share in the same. The second defendant, claiming an absolute title to the entirety of this item under the Will of Nagammal, resisted this claim of the plaintiff. It was also contended by him that the property was not the self-acquired property of Arthanatha Pillai, that his father Arthanatha had no right of disposition over the same and that therefore the plaintiff had no right to claim any share in respect of this item relying on the Will (Exhibit A-1). He further contenbed that the consideation for the same had not been proved to have been paid by his father and that in any case even if consideration had been paid by Arthanatha Pillai there was no evidence to show that he did not intend by such payment to benefit his third wife Nagammal. Alternatively he contended that even under the Will, Nagammal obtained an absolute estate and that therefore she was entitled to dispose of the same in any manner she liked and that the plaintiff had no claim for a share in

respect of the same. Even if the Will is construed as not conferring an absolute estate in favour of the sons of Arthanatha and is a conditional bequest and the conditions not having been satisfied, the plaintiff and the other sons are not entitled to any share in the same except the second defendant. The trial Court held that the property was purchased by Arthanatha benami in the name of his wife from and out of his own income and that it was purchased by him in the name of Nagammal for the benefit of Nagammal and her sons and not Nagammal exclusively. The learned Subordinate Judge also found that the Will executed by Nagammal had not been proved and that she had a'so no disposing power over this item of property. In respect of the plaintiff's case that Chockalinga, one of the sons, had released his right over the same and that therefore the plaintiff was entitled to a 1/3 share in the suit item, the trial Court held that the release deed executed by Chockalinga was a sham and nominal document and that therefore the legal representatives of Chockalinga were also entitled to a share. In that view, the trial Court decreed the suit declaring that the plaintiff, the first defendant and the second defendant are each entitled to 1/4 share and the legal representatives of Chockalinga the remaining 1/4 share.

3. In this appeal Mr. M. S. Venkatarama Iyer, learned Counsel for the appellant, first contended that the sale-deed dated 22nd August, 1921 (Exhibit B-52) is not a benami transaction, that apart from the self-serving statement in the Will executed by Arthanatha Pillai, there is no evidence to show either that the consideration was paid by Arthanatha or that the property was the self-acquired property of Arthanatha. The first question, therefore, that arises for consideration is as to who provided the consideration for the sale deed (Exhibit B-52) dated 22nd August, 1921. The recitals in the sale deed itself are not of much assistance. The consideration for the sale was a sum of Rs. 3,400, out of which a sum of Rs. 2,600 was reserved for the purpose of discharging two earlier mortgages over the property. The document further states that the balance of Rs. 800 was paid in cash. But, in his Will dated 13th July, 1927, Arthanatha Pillai had stated that he purchsed that property with his own money but in the name of his wife and that it was his self-acquired property. The learned Counsel for the appellant charcterised this document as a self-serving statement which could not be relied on to find that the consideration for the sale was provided by him. Clause (7) of section 32 of the Evidence Act, is to the effect that a statement made by a person, which is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (*a*), is a relevant fact and therefore admissible in evidence. But, the learned Counsel contended that the statement contained in the Will itself would not be admissible in evidence as the Will cannot be stated to be a transaction as is mentioned in section 13, clause (*a*). In other words, the phrase "which relates to any such transaction", according to the learned Counsel, qualifies the "deed, will or other document" referred to in clause (7) of section 32. We are unable to accept this contention of the learned Counsel. Under section 13, where the question is as to the existence of any right, any transaction by which the right was created, claimed, modified, recognised, asserted or denied or which was inconsistent with its existence, is a relevant fact. Now, in the instant case, the question is whether the property was purchased by Arthanatha out of his own funds but in the name of his wife Nagammal and Arthanatha had any right over the property. That such a right was vested in Arthanatha was claimed by him in his Will (Exhibit A-1.) The phrase "which relates to any such transaction", in our opinion, qualifies the word "statement" in clause (7) of section 32. The 'transaction' referred to in Clause (7) would, in the instant case, therefore, have reference to the sale deed dated 22nd August, 1921 and since Arthanatha had asserted his right with respect to that transaction in his Will dated 13th July, 1927, that statemeut is a relevant fact and is admissible in evidence. But, what effect we have to give to that statement will have to depend on the other facts and circumstances in this case. That statement itself may not be conclusive evidence that the property is

the self-acquired property of Arthanatha or that he provided the consideration for the sale. But, in the instant case, we have the unique fact of absence of any other contrary evidence than that found in the Will of Arthanatha himself. In fact, certain of the statements of the other sons of Arthanatha go to confirm his statement that it is his self-acquired property. Exhibit A-42 dated 28th January, 1928 is a release deed executed by the two sons of Arthanatha through his first and second wives in favour of Nagammal and her sons and in this there is a reference to Arthanatha Pillai's Will dated 13th July, 1927 and by that document they have released all their rights in respect of the suit property. Exhibit A-10, the alleged release deed executed by Chockalingam Pillai in favour of Nagammal and his brothers, also refers to the Will executed by his father and he has released his rights in respect of the suit property for a consideration of Rs. 2,000. This is a registered document. Though this itself is challenged as a sham and nominal document, not having any effect, so far as this recital is concerned, we do not think there is any reason for not relying on the same. Exhibit A-2 is another important document which is a mortage deed executed by Nagammal, the plaintiff, the first defendant and Chockalinga in favour of the Thanjavur Permanent Bank Limited, Thanjavur, mortgaging the suit items and claiming title in respect of the same under the Will executed by Arthanatha. Nagammal did not rely, in support of her title to the same, on the sale deed dated 22nd August, 1921. These facts in a way corroborate the statement given by Arthanatha in his Will that the property was purchased by him out of his own funds in the name of his wife. Though there is no direct evidence relating to the motive for purchasing this property in the name of his third wife, the reason is not far to seek. It is seen from the recitals in his Will that Arthanatha and his brothers continued to be members of a Hindu undivided family until about the year 1926 and his sons through the first and second wives were not living with him and they were living with their respective mothers in their respective grand-mothers' houses, without caring for the father. In these circumstances, it may be reasonable to assume that he purchased the property in the name of his wife in order to take it out of any possible claim by his own brothers or the sons by the first and second wives.

4. It is next contended by the learned Counsel, relying on section 82 of the Indian Trusts Act, 1882, that Arthanatha intended to provide the consideration for the benefit of his wife and that therefore the property was the absolute property of Nagammal. Section 82 of the Trusts Act provides that where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. According to the learned Counsel, the payment of consideration alone will not prove a resulting trust, but it must also be proved that the person who provided the consideration did not intend to pay or provide such consideration for the benefit of the transferee and the onus is on the person who asserts that such person did not intend to pay or provide such consideration for the benefit of the transferee and not on the transferee himself, to show that the person did intend to provide the consideration for his or her benefit. He also relied on the provisions ef section 81 in support of the construction placed by him on section 82. We are unable to agree with this contention of the learned Counsel. When once it is proved that the consideration was provided by a person other than the transferee and it is claimed that the person who provided the consideration did not intend to provide such consideration for the benefit of the transferee, the onus is on the transferee to show that the person who provided the consideration did intend to provide ihe consideration for his or her benefit. The question that will have to be considered after finding that the consideration was provided not by the transferee but the by other person, is as to whether such other person did intend to provide the consideration for the benefit of the transferee and not whether such

person did not intend to benefit the transferee. This could be arrived at both from the language of section 82 itself and from the general principles of evidence and onus of proof. It is now well-settled that in Indian Law the English rule as to presumption of advancement has not been adopted. Therefore, once it is found that the consideration has been provided by the husband, there being no presumption of advancement, it will have to be proved by the person claiming to be the transferee that the consideration was provided for her benefit. But, section 82 recognises that money might have been contributed by another towards a purchase with the intention of giving the beneficial interest to the person in whose name the purchase is made. The fact to be proved being a positive issue that the person intended to give the consideration to benefit the transferee, the issue cannot be put in the negative form so as to make the person who provided the consideration to show that he did not intend to provide such consideration for the benefit of the transferee. This is the ratio, in our view, of the decision in *Chittaluri Sitamma and another* v. *Saphur Sitapatirao and others*[1] where the learned Judges held:

> "It is true that in the Indian law the English rule as to presumption of advancement has not been adopted, but section 82, Trusts Act, as well as the observations of the Judicial Committee in *Mt. Bilas Kunwar* v. *Desraj Ranjit Singh*[2]. recognized that money may have been contributed by another towards a purchase with the intention of giving a beneficial interest to the person in whose name the purchase is made. The relationship of husband and wife between the person who contributes the money and the person in whose name the sale is taken will be a very importannt factor in determining whether the transaction was really meant for the benefit of the wife or not."[1]

The onus is, therefore, on the second defendant to prove the the consideration was provided by his father to benefit his wife.

5. The learned Counsel relied on certain recitals in Exhibit A-1, the Will executed by Arthanatha, as supporting his case that he intended to benefit his wife Nagammal. In particular, he relied on the recitals to the effect that his wife Nagammal is to take the property and maintain his children as he was doing himself. He also relied on the recitals in clause (9), (10) and (11), which are to the effect that she is to be in possession, receive the income and maintain the children. He also contended that the recitals relating to the disposition in favour of his sons, do not in any way detract from the absolute grant made in favour of Nagammal and those recitals are only precatory or pious wish and not binding or obligatory conditions. We are unable to agree with this construction of the learned Counsel. Though in clause (8) the testator stated that his wife Nagammal is to take the property and maintain his children, the later clauses in the document show that he did not intend to confer an absolute estate on his wife. In clause (13) it is stated that she had no power either to alienate or otherwise encumber the property. Even with reference to the income and other outstandings, it was stated that she had only a right to receive the income for the purpose of maintaining his children and she had no power of her own to receive them for any other purpose without the consent of the testator's brother, one Viswanathan Pillai. There were also dispositions of specific amounts for marriage expenses out of the income from the property in favour of all his children including the sons by the first and second wives. There was the further disposition that after the lifetime of his wife Nagammal, such of those persons who were disciplined, obedient and supporting Nagammal during her lifetime should inherit the same in proportion to their respective shares in the joint family. We are unable to agree that this bequest in favour of the testator's sons was either precatory or not obligatory A reading of the entire Will and the various clauses therein shows that the testator intended to give a life estate in favour of his wife Nagammal and even there with some restrictions on the income

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1. I.L.R. (1938) Mad. 220: (1938) 2 M.L.J. 606: 46 L.W. 651: A.I.R. 1938 Mad. 8.

2. I.L.R. (1915) 37 All. 557 42 I.A. 202: A.I.R. 1915 P.C. 96: 29 M.L.J. 335 p, 564 (P.C.).

from the properties and the remainder in favour of such of those sons who conformed to the conditions prescribed therein. We are, therefore, of the view that neither Nagammal was the true owner of the property, nor did her husband intend to provide the property for her benefit. The property was purchased by Arthanatha out of his own funds in the name of his wife and he continued to be the real owner of the property. Being a self-acquired property, there is no dispute that he had a disposing power and therefore the disposition under Exhibit A-1 Will was valid.

6. The next question that arises for consideration is as to whether the plaintiff and the other sons have satisfied the conditions prescribed in the Will of Arthanatha in order to enable them to inherit the property. The learned Counsel for the appellant submitted that the recitals in the Will (Exhibit B-2) executed by Nagammal show that the first defendant and Chockalinga were not entitled to inherit the property as they have not conformed to the conditions prescribed in the Will of the testator. In this regard, one other question which arises for consideration is as to whether the due execution of the Will (Exhibit B-2) had been proved in this case. Under section 63 (*c*) of the Indian Succession Act, a Will shall be attested by two or more witnessess, each of whom must have seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator. Therefore, proof of due execution requires that either one or more of the attesting witnesses should prove the execution by the testator and the attestation by each of them. This is also the ratio of the judgment of a Division Bench of the Bombay High Court in *Roda Framroze* v. *Kanta Varjivandas*[1], The Will (Exhibit B-2) was attested by P.W. 2 and one Swaminatha Iyer. Of course, P. W. 2, in cross-examination, admitted that Nagammal signed the Will and he attested the document. But, he did not speak to the attestation of Swaminatha Iyer or Swaminatha Iyer having seen the executant sign the document. The second defendant himself admits in his evidence that Swaminatha Iyer was alive; but he had not been examined. He gave the explanation that since P.W. 2 had turned hostile against him, he did not risk examining the other attestor though he would say that there is no enmity between him and the other attestor. Of course, he had stated in his evidence that the scribe read over the contents to his mother and she signed thereafter and that P.W. 2 and Swaminatha Iyer were present and they attested the Will. But, it was suggested to him in cross-examination that these witnesses did not attest the document at the same time, and that at the time when P.W. 2 attested, the other attesting witness was not present. There was no suggestion to P. W. 2 that the attestation of Swaminatha Iyer was also made at the time when P. W. 2 attested the document and both the attesting witnesses knew the execution by the testator. We are, therefore, of the view that the due execution of the Will had not been proved.

7. Even so the learned Counsel for the appellant contended that though the Will could not be relied on as evidencing any disposition, for claim of title under the same, the recital could be relied on as a statement made in a document within the meaning of section 32 (7) of the Evidence Act. We think that the learned Counsel is well-founded in this contention. The document may fail as a Will for want of proof of due execution as provided under section 63 (*c*) of the Indian Succession Act. But, still, if the signature of the executant is true, it would be a document signed by the person, though it would not have the effect of a Will. The statements in such a document would be statements made by a deceased person relating to a transaction as is mentioned in section 13, clause (*a*) of the Evidence Act. We are, therefore, of the view that the recitals in the document itself could be relied on except for the purpose of claiming title under the same. Even so, we are unable to accept the contention of the learned Counsel that the recitals in any way prove that the plaintiff, the first defendant and

1. A.I.R. 1946 Bom. 12.

Chockalinga had not complied with the conditions prescribed under the Will of Arthanatha in order to succeed to the properties. We proceed on the basis that the conditions prescribed in the Will of Arthanatha, *viz.*, that only such of those sons who are disciplined, obedient and supporting the mother should succeed to the property, are clear, unequivocal and certain and, therefore, valid conditions. Exhibit B-2 states that the first defendant had borrowed money from Nagammal on certain promissory notes to the extent of Rs. 4,400 and had not returned the money. The second son Chockalinga had executed a release deed for a consideration of a sum of Rs. 2,000. Though that consideration was not paid, there was a direction in the Will to pay that amount to Chockalinga, with a charge over the properties for payment of the same. The Will further states that on 31st January, 1940 she purchased some house property and that has to be taken by the plaintiff and the present disputed item was given to the second defendant. These recitals do not show that she had any grievance against the sons or that they did not comply with the terms and conditions of the Will of Arthanatha. What seems to have weighed in her mind for giving the property in favour of the second defendant was that the plaintiff had been given a house, the first defendant had the benefit of the moneys advanced by her under the promissory notes and Chockalinga would be getting Rs. 2,000 under the Will itself and that would be a fair and equitable distribution of the properties available with her. Far from supporting the claim of the appellant that the other sons had not complied with the terms and conditions of the Will, the recitals themselves show that they have strictly complied with the terms and conditions. If that be so, it could not be contended that she had disposing power over the disputed property except as provided under the Will of Arthanatha. In this connection, we also consider that the finding of the lower Court that Exhibit A-10 release deed executed by Chockalinga was a sham and nominal document and was not given effect to, is correct and has to be upheld. Admittedly, the sum of Rs. 2,000 recited as the consideration for that release had not been paid as late as 1961, though the release deed itself is of the year 1937. The Will executed by Nagammal also provided for payment of this sum of Rs. 2,000 with a charge over the suit properties. This will not be enough to give effect to that document itself, for the value of Rs. 2,000 in 1937 would not be the same in 1961. Except the statement that he had executed a release deed, nothing is stated about his conduct and submissive nature, so as to disentitle him from inheriting the property as per the Will of his father. We, therefore, hold that Chockalinga also was not disentitled. We, accordingly confirm the finding of the Court below that the plaintiff, the first defendant, the 2nd defendant and the legal representatives of Chockalinga, *viz.*, defendants 14 to 16, are entitled to inherit 1/4 share each in the disputed item.

8. The result is, the appeal is dismissed with costs (one set) and the judgment and decree of the lower Court are confirmed.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Maharajan., J.*

R. Ramanathan Chettiar, through Power Agent Subbiah Chettiar ... *Appellatnt**

v.

K. R Rathinammal and others. ... *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXI of 1948)—Section 55—The Madras Estates Land (Reduction of Rent) Act (XXX of 1947)—Village notified under 1948 Act—Enquiry by Settlement Tahsildar—Act held not applicable—Appeal to Tribunal by the tenant—Appeal allowed—Village held to be Inam Estate—Proceedings before High Court—Suit against tenants for recovery of rent by Inamdars in Munsif Court—Application for stay of suit in the High Court—Deposit by tenants of 1/3 of the amount claimed as rent as per orders of the High Court—Landholders withdrawing amount—Orders of Tribunal and the notification made by Government quashed by High Court—Appeal by Government to Supreme Court—Appeal allowed—Inamdars' suit dismissed by the Munsif Court—Application by tenants for restitution of amounts deposited—Whether entitled to—Civil Procedure Code V of 1908) sections 144 and 151—When order for restitution can be passed.

Section 144, Civil Procedure Code, embodies the cardinal principle of law that acts of Courts should not be allowed to work any injury on the suitors and it is the clear duty of the Court to place the parties in the position which they would have occupied but for the erroneous order or decree which it had passed. The section is not exhaustive of the powers of the Court to order restitution and in suitable and appropriate cases, restitution can be and has been ordered in exercise of the Court's inherent jurisdiction under section 151 of the Civil Procedure Code. Where section 144 does not apply and the inherent jurisdiction under Section 151 is invoked, the Court will order restitution only if the ends of justice require it, or to prevent abuse of the process of the Court. This is a consideration, which is relevant while exercising jurisdiction under section 151 of the Civil Procedure Code but entirely irrelevant while exercising jurisdiction under section 144. If it is under section 151 that restitution is to be ordered in this case, it is necessary to find out whether the ends of justice require that the Court should order restitution. [*Para.* 8]

Section 151 of the Civil Procedure Code prescribes that the Court shall have Inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. If section 144 were to apply, restitution would be automatic and there would be no room for equitable consideration which would govern restitution, under section 151. [*Para.* 9]

It was held that, having regard to the circumstances of the case, it would be wholly inequitable to direct the landholder, who had withdrawn the monies deposited by the tenants and who was entitled under the law to appropriate the same, on account of rent arrears, to redeposit the same into Court. If the restitution was ordered and the tenants were allowed to withdraw the amount deposited, they would not stand to gain either, because they would have to pay back the same in proceedings under the Revenue Recovery Act. It would therefore be a wholly needless ritual to direct the landholder to pay these amounts to the tenants with the right hand and take back the same from the tenants with the left. It will be an abuse of the process of the Court to do so and the ends of justice would not be served by passing such an order for restitution. [*Para.* 12]

Case referred to:—

Chockalingam v. *Krishna*, I. L. R. (1964) 1 Mad. 923: 77 L. W. 233: A. I. R. 1964 Mad. 404.

Appeals against the orders of the Court of the Subordinate Judge, Sivaganga dated 7th April, 1971 and made in C.M.A. Nos. 41, 35, 39 and 40/70 respectively (E.A. Nos. 76, 60, 69 and 50/69 in O. S. Nos. 339, 327, 334 and 319 of 1957 respectively) on the file of the District Munsif's Court, Sivaganga.

N. Srivatsamani, for Appellant.

K. R. Thiagarajan, for Respondents.

*A. A. A. O. Nos. 13, 68, 76 and 78 of 1972.
16th July, 1974.

The Court made the following

ORDER:—These civil micellaneous second appeals arise under the following circumstances:—

2. The appellant herein was the Inamdar of Thenkarai village in Ramanathapuram District. Originally, this village was sought to be notified under the Madras Estates Abolition Act and the Settlement Officer made enquires to find out if the village was an inam estate within the meaning of the Act. The respondents herein and other tenants participated in the enquiry by leading evidence. Ultimately, the Settlement Officer, by his order dated 27th September, 1949, held that Thenkarai village was not an inam estate within the meaning of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948). The view of the Settlement officer was that the grant of Thenkarai village comprised of both the warams and, therefore, the Act was not applicable.

3. The tenants appealed against this order to the Estates Abolition Tribunal, Madurai. The Tribunal held by its order dated 21st April, 1950 that the village was an inam estate and reversed the finding of the Settlement officer. Thereupon, the appellant-inamdar, filed two writ petitions in this High Court, one in C. M. P. No. 4845 of 1951 and another in C. M. P. No. 10866 of 1950, challenging the view of the Tribunal, but both these petitions were dismissed by this Court. Against the orders of dismissal, two Letters Patent Appeals were filed. Meanwhile, the inamdar-appellant had instituted suits against the respondents herein and other tenants in O. S. Nos. 292 to 339 of 1957 on the file of the District Munsif's Court, Sivaganga, for recovery of rent for Faslis 1364 to 1366. During the pendency of the writ appeals, one of the tenants, Chockalingam, moved the High Court for stay of trial of the said suits and on his application a conditional order was passed, whereby the trial of the said suits was stayed on condition that the tenants deposited into the trial Court 1/3 of the amount claimed by the inamdar by way of arrears of rent. This amount was deposited by the tenants.

4. Subsequently, the High Court allowed the Letters Patent Appeals and quashed the order of the Estates Abolition Tribunal as well as the notification made by the Government under the Estates Abolition Act. The basis of this decision was that the Thenkarai village was not an inam within the meaning of the Estates Abolition Act. Thereupon, the State of Tamil Nadu preferred appeals to the Supreme Court. By its judgment dated 20th September 1965, the Supreme Court allowed the appeals, after holding that the village concerned was really an inam within the meaning of the Estates Abolition Act. In pursuance of the judgment of the Supreme Court, the Government of Tamil Nadu published a notification on 3rd August 1966 whereby it notified the village as an estate. On 28th July, 1969, the District Munsif, Sivaganga, dismissed O. S. Nos. 292 to 339 of 1957 on the ground that the estate had been notified, and therefore, the civil Court had no jurisdiction to entertain the suits by the inamdar for recovery of arrears of rent due. This view was taken because under section 55 of the Estates (Abolition and Conversion into Ryotwari) Act, after the notified date, the landholder shall not be entitled to collect any rent which accrued due to him from any ryot before, and is outstanding on that date, but the manager appointed under section 6 shall be entitled to collect all such rent and any interest payable thereon together with any costs which may have been decreed, as if they were arrears of land revenue; and there shall be paid to the landholder all amounts so collected after deducting (*a*) ten per cent thereof on account of collection charges, (*b*) the arrears of peshkash, quit rent, jodi and other amount, if any, of like nature due from the landholder to the Government, and (*c*) the rent, if any, collected before the notified date by the landholder from the ryots in respect of the fasli year in which the estate is notified under this Act and any amount collected by the landholder from the ryots in excess of the rent determined under the Madras Estates Land (Reduction of Rent) Act, 1947 and outstanding to the credit of the ryots on the first day of the fasli year. Section 58-A of the Act provided that no Court shall, before the date on which the deposit in pursuance of section 54-A is made, order or continue execution in respect of any decree or order passed against the prin-

cipal or any other landholder of an estate, etc. After the dismissal of these suits, the tenants came forward with applications under section 144 of the Civil Procedure Code for restitution of the amounts they had already paid into Court in pursuance of the order passed by the High Court in the writ appeals already referred to. Both the trial Court and the first Appellate Court ordered restitution in favour of the tenants. It is against the concurrent orders of the two Courts that the present civil miscellaneous second appeals have been filed by the landholder.

5. The first question that arises for consideration is whether the tenants are entitled to restitution within the meaning of section 144 of the Civil Procedure Code. That section provides that where and in so far as a decree or order is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied, but for such decree or order or such part thereof, as has been varied or reversed, and for this purpose, the Court may make any orders including orders for refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

6. Be it noted that section 144 does not in terms apply to these cases. No decree was really granted by the Sivaganga Munsif's Court, nor was it altered or varied in appeal or second appeal. What happened was, the trial of the suits pending in the Sivaganga Munsif's Court was stayed by this High Court in certain writ appeal proceedings on condition that the tenants paid into the Sivaganga Munsif's Court, 1/3 of the amount claimed by the landholder by way of arrears of rent due by the tenants. I do not know how the High Court was persuaded to pass this order. The subject-matter of the suit before the Sivaganga Munsif's Court was not before this Court for adjudication, except in a remote sense; the validity of the finding of the Estates Abolition Tribunal that the village Thenkarai was an inam, within the meaning of the Estates Abolition Act was alone being canvassed in the writ appeals. The finding on this question did not have any direct impact upon the claim made by the inamdar in the Sivaganga Munsif's Court for a decree for arrears of rent. It might have only an indirect effect upon the claim made in those suits. In fact, till the notification was made by the Government on 3rd August, 1966, in pursuance of the judgment of the Supreme Court, the inamdar was entitled to institute suits against his tenants for recovery of arrears of rent and obtain decrees therefor. There was no embargo placed by law upon the institution of suits by the inamdar for recovery of arrears of rent against his tenants, even assuming that the village was an inam village coming within the mischief of the Estates Abolition Act.

7. In these circumstances, there was absolutely no room for the application of section 144 to the facts of this case. No order that was directly passed by the Munsif's Court had been set aside, varied or altered by the Supreme Court. In consequence of a declaration by the Supreme Court that the village was an inam village within the meaning of the Estates Abolition Act, the Government proceeded to notify the village. It was the notification by the Government that had the statutory effect of placing an embargo upon the suits previously filed by the landlord against the tenants for recovery of arrears of rent. No doubt, after the notification, the inamdar could not collect any rent from his tenants even for the period prior to the notification, because under section 55 of the Act, it is the manager appointed under the statute that would become entitled to recover arrears of rent and pay the same to the landholder after deducting therefrom the collection charges, jodi, peshkash, etc.

8. In those circumstances, both the Courts below were wrong to hold that section 144 of the Civil Procedure Code in terms applied to the facts of this case. As has been held by a Division Bench of this Court in *Chockalingam* v. *Krishna*[1] section 144 embodies the cardinal principle of law that acts of Courts should

1. I.L.R. (1964) Mad. 1 923: 77 L.W. 233: A.I.R. (1964) Mad. 404.

not be allowed to work any injury on the suitors and it is the clear duty of the Court to place the parties in the position which they would have occupied but for the erroneous order or decree which it had passed. The section is not exhaustive of the powers of the Court to order restitution and in suitable and appropriate cases, restitution can be and has been ordered in exercise of the Court's inherent jurisdiction under section 151 of the Civil Procedure Code. Where section 144 does not apply and the inherent jurisdiction under section 151 is invoked, the Court will order restitution only if the ends of justice require it, or to prevent abuse of the process of the Court. This is a consideration, which is relevant while exercising jurisdiction under section 151 of the Civil Procedure Code but entirely irrelevant while exercising jurisdiction under section 144. If it is under section 151 that restitution is to be ordered in this case, it is necessary to find out whether the ends of justice require that the Court should order restitution.

9. In fact, section 151 of the Civil Procedure Code prescribes that the Court shall have inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. If section 144 were to apply, restitution would be automatic and there would be no room for equitable considerations which would govern restitution, under section 151 of the Civil Procedure Code.

10. Now, the question arises whether, in the circumstances of the case, the landholder should be directed to refund the amount which the tenants deposited as a condition-precedent to their obtaining stay of trial of the suits in the District Munsif's Court, Sivaganga. While upon this question, it is necessary to refer to the following circumstanees ;

11. The landholder instituted suits for recovery of rent due from the tenants for the Faslis from 1364 to 1366, corresponding to the years 1954 to 1956. The landholder, in the plaint, claimed half a share in the net produce of the lands. The defendants, in the printed statements which they filed in the several suits, contended that they were liable to pay only 1/6 share out of the produce of the fields, that they had actually tendered the amounts to the inamdar's employees and, asked them to issue receipts, but the latter, fearing that the issue of such receipts would bring them within the mischief of the Rent Reduction Act, refused to issue vouchers. The effect of this plea, which is incorporated in paragraph 11 of the printed written statements of the tenants, is that they were liable to pay at least 1/6 share of the gross produce, that they were prepared to tender the same to the plaintiff, but did not pay because the plaintiff's men (inamdar's men) refused to issue receipts therefor.

12. In view of these admissions of the tenants, the suits would have been decreed against them at least in respect of the 1/3 of the amount claimed in the plaint. This is probably the reason why in the writ appeals, the tenants agreed to deposit into Court 1/3 of the amount claimed by the inamdar in the suits. It would then follow that the amount deposited by the tenants into Court represented monies which were admittedly due by the tenants to the landholder for the Faslis 1364 to 1366. But for the stay obtained by the tenants from the High Court, the landholder would have proceeded to prosecute his suits against the tenants, obtained decrees, and realised the decretal amounts in execution long before the date of the Supreme Court judgment. As I have already pointed out, the notification by the Government of Tamil Nadu was made only on 3rd August, 1966, that is to say, 9 years after the landholder had instituted suits against the tenants in the Sivaganga District Munsif's Court. Till the date of the notification, there was no impediment in the way of the landholder recovering the rent due from his tenants, the impediment arose only after 3rd August, 1966, the date of the notification. Even after the date of the notification, the rent arrears due by the tenants for the period from Faslis 1364 to 1366 were not wiped out under the Act. Probably, the rent could only be reduced under the Rent Reduction Act and the reduced rent could still be recovered by the landholder through the instrumentality of the manager appointed

under the Estates Abolition Act. Having regard to these circumstances, it would be wholly inequitable to direct the landholder who has withdrawn the monies deposited by the tenants and who was entitled under the law to appropriate the same, on account of rent arrears, to re-deposit the same into Court at this distance of time. If I were to order restitution and allow the tenants to take back the amount, they do not stand to gain either, because they would have to pay back the same in proceedings under the Revenue Recovery Act, which the manager appointed under the Estate Abolition Act is entitled to set in motion against the tenants. It would, therefore, be a wholly needless ritual to direct the landholder to pay these amounts to the tenants with the right hand and take back the same from the tenants with the left. It will be an abuse of the process of the Court to do so and I am clear in my mind that the ends of justice will not be served by passing such an order of restitution.

13. In the circumstances, I set aside the concurrent orders of the Courts below and dismiss the restitution petitions filed by the respondents in these four appeals. In the circumstances of this case, I refuse to pass any order as to costs.

R.S. —— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam and A. Varadarajan, JJ.*

Lakshmi Narayan Karva and others ... ... *Appellants**

v.

Satyanarayan Khubchand Karva, Begum Bazaar, 14-67/3 Begum Bazaar, Hyderabad. .. *Respondents.*

Trade and Merchandise Marks Act (XLIII of 1958), *sections* 46 *and* 56—*"Aggrieved persons"—Meaning of—Section* 9 (3)—*Combination mark—Whether distinctive.*

The word "aggrieved person" occurring in section 56 of the Trade and Merchandise Marks Act includes a person who has before registration used the trade mark in question as also a person against whom an infringement action has been taken or threatended by the registered proprietor of such a trade mark. [*Para.* 5]

In judging whether a combination mark is distinctive or not it is wrong to dissect the mark and show that each of its component parts is not distinctive in itself and then as a result of this process to conclude that the mark as a whole is not distinctive. [*Para.* 8]

The appellant's Trade Mark, "*SALAMMONIAC*" appearing in between two devices of a crescent and a star with the letters "RLK", considered as a whole, is distinctive and it is wrong to dissect the mark and show that each of its component parts is not distinctive in itself, and as a result of that process to conclude that the mark is wholly not distinctive. [*Para.* 9]

Cases referred to:—

National Bell Company v. *Metal Goods Manufacturing Company*, (1970) 2 S. C. J. 657 : (1971) 1 S. C. R. 70: A. I. R. 1971 S. C. 898, at page 904; *Electrical Protection Company (Proprietary) Limited's application*, ((1967) R. P. C. 261). In re. *Christiansen's Trade Mark*, 3 R. P. C. 54. *In the matter of an applieation by the Diamond T Motar Car Company to Register a Trade Mark*, 38 R. P. C. 373.

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Maharajan dated 6th February, 1970 and made in A. A. O. No. 151 of 1969 preferred to the High Court against the order of the Assistant Registrar of Trade Marks Madras, dated 9th April, 1969 and made in the matter of Trade Mark No. 217448 (Rectification No. M.A.S. 103).

B. T. Seshadri, for Appellants.

A. L. Somayajee, for *Aiyar* and *Dolia* and *S. P. L. Palaniappan*, for Respondents.

The Judgment of the Court was delivered by

Varadarajan, J.—This Letters Patent Appeal is directed against the judgment of

*L.P.A. No. 28 of 1970. 11*th July*, 1974.

Maharajan, J., in C.M.A. No. 151 of 1969, which was filed by the appellants against the order of the Assistant Registrar of Trade Marks, Madras, in an application filed by the respondents under sections 46 and 56 of the Trade and Merchandise Marks Act, 1958, in the matter of the appellants' trade mark No. 217448. The Assistant Registrar allowed the respondents' application for rectification of the Register of Trade Marks by expunging the appellants' trade mark. The appellants are a partnership firm carrying on business under the name and style of Ramachandra Lakshminarayanan Karva at Begum Bazaar, Hyderabad, Andhra Pradesh, in certain commodities including chloride used for industrial purposes. The respondents also are a partnership firm carrying on business at Begum Bazaar, Hyderabad in ammonium chloride. The appellants' trade mark consists of the word "*SALAMMONIAC*" appearing in between two devices of a crescent and a star with the letters "RLK" appearing within each device of the crescent, and it has been registered in respect of ammonium chloride used for industrial purposes. The respondents' trade mark consists of a label eontaining a device of two stars and crescent with the letters "KSI" within the crescent device and the expression "AMCLO" in between the two devices. The appellants applied for registration of their trade mark in Part A of the Register of Trade Marks on 30th August, 1963, on the allegation that the trade mark was first adopted or invented by their concern in the year 1956 for use in ammonium chloride (Navasagar) business and that it had been in use continuously from 1956 exclusively and without any interference or interruption from any quarter whatsoever. They also alleged in the application for registration that ammonium chloride worth several lakhs had been sold under the said trade mark and that the trade mark had become very popular and deserved protection of law. After examination of the application, the Assistant Registrar informed the appellants *inter alia* that the letters "RLK" appearing on the mark were not considered *prima facie* distinctive and were not registerable in Part A of the Register except upon evidence of distinctiveness under section 9 of the Act, that the word "*SALAMMONIAC*" constituting the leading feature of the trade mark was purely descriptive of the goods and was not distinctive within the meaning of section 9 of the Act and that the mark conflicted with certain trade marks, the particulars of which were furnished to the appellants. Thereupon, the appellants disclaimed the right to the exclusive use of the device of a crescent and star and the expression "*SALAMMONIAC*" and the trade mark was accepted for registration by the order of the Assistant Registrar on 9th March, 1964, and the application as accepted for registration was advertised in the Trade Marks Journal dated 1st June, 1964. Subsequently, the appellants instituted O. S. No. 13 of 1966 in the City Civil Court, Hyderabad at Secunderabad, for an injunction restraining the respondents from ever manufacturing or selling ammonium chloride or Navasagar with the respondents' trade mark impressed thereon. They have alleged in paragraph 12 of the plaint in that suit that they have suffered very much on account of the respondents introducing the goods under an imitation of their trade mark and that the continued use of the trade mark by the respondents would cause to the appellants incalculable and irreparable injury which cannot be adequately compensated by money. The respondents contended in their written statement in that suit that it was the appellants that tried to injure them out of malice and jealousy by using their trade mark. It is only after the institution of that suit the respondents filed their application before the Assistant Registrar of Trade Marks, Madras, under sections 46 and 56 of the Act for the rectification of the register of trade marks by expunging the appllants' trade mark. Their allegation in their application was that for the purpose of distinguishing their goods from those of other manufacturers, they have been using several trade marks, one of them being a lable containing devices of two stars and crescent within the letters "KCI" within the crescent device and the expression "AMCLO" in between the two devices. They claimed to have been using this trade mark on their ammonium chloride since

1961. They alleged that being in the same trade as the one carried on by the appellants they are likely to be embarassed or hurt by the registered trade mark of the appellants, who are also threatening them with legal action, and they are, therefore, persons aggrieved. they contended that the user claimed by the appellants was false to their knowledge and, therefore, the registration of the trade mark of the appellants was obtained by misleading the Registrar and the entry was made in the register without sufficient cause and it was wrongly remaining on the register. Their case was that on the date on which the appellants made their application for registration of their trade mark their mark had not been used at all and registration was obtained by false statements regarding user. They further contended that there was no *bona fide* intention on the part of the appellants to use the trade mark in respect of ammonium chloride for industrial purpose, that the appellants' trade mark was not distinctive and not capable of distinguishing the goods of the appellants and that registration was, therefore, barred by section 9 of the Act. They alleged contravention of the provisions of section 18 of the Act and prayed that the entry relating to the appellants' trade mark should be expugned under section 56 of the Act.

2. The appellants opposed the application before the Assistant Registrar contending that the respondents had not been using their trade mark from 1961, whereas they were exclusively, extensively and continuously using their own trade mark from 1956 without any interferenee from any quarters. They denied that the respondents were persons aggrieved and contended that they filed the application before the Assistant Registrar only to nullify the action taken by the appellants against them in the suit filed in the City Civil Gourt, Hyderabad at Secunderabad. They denied that they had no *bona fide* intention to use the trade mark for ammonium chloride for industrial purposes and contended that their trade mark was registered after evidence regarding distinctiveness was produced and that sectien 9 of the Act does not therefore, apply. They denied the allegation that the entry regarding the trade mark was made without sufficient cause and contended that the respondents are not entitled to invoke the provisions of section 56 of the Act.

3. The Assistant Registrar found that the respondents are persons aggrieved having regard to the fact that they are also in the same trade as the appellants and they have alleged that they are likely to be embarassed or hurt by the existence of the appellants' trade mark on the register and also that the appellants have been threatening them with legal action. The Assistant Registrar considered the yearwar sales figures produced by the appellants for the goods sold under their trade mark and also under a number of other trade marks applied for registration by the appellants and expressed the opinion that it is neither possible nor proper to apportion any part of the sales turnover figures to the appellants' trade mark in question and held that the user claimed by the appellants in respect of their trade mark from 1956 had not been made out. He expressed the further opinion that even if the sales figures produced by the appellants relate only to the goods sold under the trade mark in question, they are not sufficient to establish the distinctive character of the trade mark. He noticed that the appellants' trade mark consists of a device, a collection of three letters and a word and that the word and the device have been disclaimed by the appellants because they cannot qualify for registration since they are matters that are non-distinctive, and observed that if the trade mark of the appellants were to qualify for registration in that background, it can only be because of the three letters "RLK" present in it and that having regard to the turnover of Rs.11,000 in 1956 and Rs. 29,C0J in 1963, it was not possible to hold that the letters "RLK" has been so extensively used as to have been accepted by the public and trade as a trade mark of the appellants. In that view he held that the appellants' trade mark was registered without sufficient proof of its having become distinctive of the goods of the appellants and accordingly it was registered without sufficient cause and was wrongly remaining in the register and should be removed from the register. At the hearing before

the Assistant Registrar it appears to have been submitted on behalf of the appellants that even if the trade mark of the appellants was found to be unsuitable for registration in Part A of the register, the Registrar had a discretion to transfer the mark to Part B of the register without removing it altogether from the register. The Assistant Registrar declined to exercise the discretion on the ground that such a course was possible only if the Registrar is satisfied that the mark was not adopted to distinguish, but was capable of distinguishing and that in the present case having regard to the nature of the trade mark and the absence of evidence to prove its capability to distinguish the goods of the appellants, it was not possible to hold that the mark was capable of distinguishing and could not, therefore, be transferred to Part B of the register. Thus, the Assistant Registrar allowed the respondents' application as paryed for and declined to transfer the appellants' trade mark to at least Part B from Part A of the register. The appellants filed C.M.A. No. 151 of 1969 against that order.

4. Referring to the three letters "RLK." occurring in the appellants' mark in between the crescents and the stars, *Maharajan, J.*, has observed in his judgment that there is nothing inherently distinctive about any of these three letters of the English alphabet, and that there is nothing distinctive about the manner in which these letters have been placed in the trade mark. He expressed the view that the registration of these letters would certainly have the effect of improperly interfering with the rights of existing or future firms having the initials "RLK" to attach the initials of their firm name to their goods. The learned Judge thought that a trade mark consisting of a letter or letters is a weak trade mark and to be entitled to registration it should have enjoyed wide and extensive circulation to such an extent that to all persons concerned in that particular trade, the letter or letters should have become indicative of the manufacturer and the persons using the trade mark. Discussing the evidence regarding the user of the trade mark of the appellants, the learned Judge found that the mark must have been used after August 1962, that is to say, for about just one year before the appellants made their application for registration of the same on 30th August, 1963 and observed that there is little evidence to show that during this short period the goods produced by the appellants had become associated in the public mind with the letters "RLK". Thus, he agreed with the Assistant Registrar and held that the letters "RLK" are registerable neither in Part A of the register as an inherently distinctive mark nor in Part B of the register as being inherently capable of distinguishing or by reason of the use of the trade mark or of any other circumstances it is so adapted to distinguish. Having regard to the fact that the appellents had filed O.S. No. 13 of 1966 in the City Civil Court, Hyderabad at Secunderabad, for injunction against the respondents, and to the contentions of the parties, namely, the appellants complaining in paragraph 12 of the plaint in that suit that they have suffered very much on account of the respondents introducing the goods under an imitation of their trade mark and the continued use of the trade mark by the respondents would cause incalculable and irreparable injury to them, and the respondents contending that it is the appellants that tried to injure them out of malice and jealousy by using their trade mark, the respondents were persons aggrieved. In this view, the learned Judge held that the registration of the appellant's trade mark was without sufficient cause and the entry wrongly remained in the register and dismissed the appeal with costs. Hence this letters patent appeal.

5. Section 56 (1) of the Trade and Merchandise Marks Act, 1958, provides for application being made in the prescribed manner to a High Court or to the Registrar by any person aggrieved for cancelling or varying the registration of a trade mark on the ground of any contravention, or failure to observe a condition entered on the register in relation thereto. Sub-section (2) of that section provides for any person aggrieved by the absence or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by

any entry wrongly remaining on the Register, to apply in their prescribed manner to a High Court or to the Registrar, for making, expunging or varying the entry as it or he may think fit. The respondents are a firm carrying on business *inter alia* in ammonium chloride, which is also put in the market by the appellants. The parties are, therefore, rival traders in ammonium chloride. The appellants have instituted O. S. No. 13 of 1966 in the City Civil Court, Hyderabad at Secunderabad, against the respondents for an injunction restraining them from ever manufacturing or selling ammonium chloride with the respondents' trade mark mentioned above. The Supreme Court has observed in *National Bell Company* v. *Metal Goods Manufacturing Compay*[1]

> "The expression "aggrieved person" has received liberal construction from the Courts and includes a person who has, before registration, used the trade mark in question as also a person against whom an infringement action is taken or threatened by the registered proprietor of such a trade mark."

The respondents being rival traders against whom the appellants have taken an infringement action would be aggrieved persons entitled to file an application under section 56 of the Act. Therefore, we agree with the learned Judge and find that they are persons aggrieved.

6. Sub-sections (1) and (2) of section 9 of the Act lay down the requisites for registration of trade marks in Parts A and B of the register. They read:—

> "(1) A trade mark shall not be registered in Part A of the register unless it contains or consists of at least one of the following essential particulars, namely:—
>
> (*a*) the name of a company, individual or firm represented in a special or particular manner;
>
> (*b*) the signature of the applicant for registration or some predecessor in his business;
>
> (*c*) one or more invented words;
>
> (*d*) one or more words having no direct reference to the character or quality of the goods and not being, according to its ordinary signification, a geographical name or a surname or a personal name or any common abbreviation thereof or the name of a sect, caste or tribe in India;
>
> (*e*) any other distinctive mark.
>
> (2) A name, signature or word, other than such as fall within the descriptions in clauses (*a*), (*b*), (*c*) and (*d*) of sub section (1) shall not be registrable in Part A of the register except upon evidence of its distinctiveness."

Sub-section (3) of section 9 says that the expression "distinctive" in relation to the goods in respect of which a trade mark is proposed to registered, means adopted to distinguish be goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists either generally or, where the trade mark is proposed to be registered subject to limitations, in relation to use within the extent of the registration. Sub section (4) says that a trade mark shall not be registered in Part B of the register unless the trade mark in relation to the goods in respect of which it is proposed to be registered is distinctive, or is not distinctive but is capable of distinguishing goods with which the proprietor of a trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally, or, where the trade mark is proposed to be registered subject to limitations, in relation to use within the extent of the registration. Sub-section (6) of the section confers a discretion on the Registrar subject to the other provisions of section 9 to transfer a trade mark in respect of any goods, registered under Part A of the register to Part B and *vice versa* in the name of of the same proprietor of the same trade mark or any part or parts thereof. Section 18 (4) of the Act enables the Registrar, subject to the provisions of of the Act, to refuse an application for registration of a trade mark or to accept it absolutely or subject to such amend-

1. (1970) 2 S.C.J. 667: (1971) 1 S.C.R. 70: A.I.R. 1971 S.C. 898, p. 904.

ments, modifications, conditions or limitations if any as he may think fit. Section 28 of the Act mentions the right conferred by registration of a trade mark in Part A or Part B of the register. Under section 29 (2) of the Act, in an action for infringement of a trade mark registered in Part B of the register an injunction or other relief shall not be granted to the plaintiff if the defendant establishes to the satisfaction of the Court that the use of the mark of which the plaintiff complains is not likely to deceive or cause confusion or to be taken as indicating a connection in the course of trade between the goods in respect of which the trade mark is registered and some person having the right, either as registered proprietor or as registered user, to use the trade mark.

7. As we mentioned earlier, on the insistence of the Assistant Registrar of Trade Marks before registration of the appellants' trade mark, the appellants disclaimed the right to exclusive use of the devices of crescent and star with the expression '*SALAMMONIAC*' and it was only thereafter their application was accepted by the Assistant Registrar by order dated 9th March, 1964 and the application as accepted for registration was advertised in the Trade Marks Journal on 1st June 1964. Having regard to the said disclaimer both the Assistant Registrar in his order on the respondents application for rectification of the register by expunging the appellants' trade mark, and Maharajan, J., in the judgment in C.M.A. No. 151 of 1969 thought that the only marks which are left are the three letters "RLK" presenting the initials of the proprietors of the business. The Assistant Registrar, while allowing the respondents' application has observed that it is not possible for him to come to the conclusion that the letters "RLK" have been so extensivly used as to have been accepted by the puplic and trade as a trade mark of the registered proprietor. The learned Judge has observed in his judgment that to register these three letters would certainly have the effect of interfering with the rights of the existing or future firms having the initials "RLK" to attach the initials of their firm name to their goods.

8. In re *Christiansen's Trade Mark* [1], at page 62 it is observed:

> "There must be a distinction between two labels unless they are identical, and the Act of Parliament has said that, although there is a distinction, that is, in other words, although they are not identical, yet if that distinction is so small that, notwithstanding it, the whole thing is so like the other that it might deceive, although it is not the same as the other, it ought not to stand on the register."

Therefore, the mark must be considered as a whole. The appellants' trade mark consists of the word "SALAMMONIAC" appearing in betwean two devices of crescent and star with the letters "RLK" appearing within each device of the crescent and not the letters "RLK" alone. *In the matter of an application by the Diamond T Motor Car Company to Register a Trade Mark* [2] it is observed at page 380:

> "...... in order to ascertain whether the applicants' trade mark is a registrable trade mark, the sole question to be determined is whether it is adapted to distinguish the vehicles of the applicants from those of other manufacturers, and in determining this question it is, in my judgment, immaterial to consider whether any of its component parts are not registrable by themselves under paragraphs (1) to (4) (of section 9).
>
> Now it has often been said that it is wrong, in judging whether a combination mark is distinctive or not, to dissect the mark, and to show that each of its component parts is not distinctive in itself, and then, as the result of this process to conclude that the mark as a whole is not distinctive.
>
> .... in order to determine whether a mark is so adapted, it must be considered apart from the effects of registration. What has to be ascertained is whether the mark itself, if used as a trade mark, is likely to become actually distinctive of the

1. 3 R.P.C. 54.
2. 38 R. P. C. 373.

> goods of the person so using it; this must largely depend upon whether other traders are likely, in the ordinary course of business and without any improper motive, to desire to use the mark, or one resembling it, upon or in connection with their own goods."

This decision makes it clear that in judging whether a combination mark is distinctive or not it is wrong to dissect the mark and show that each of its component parts is not distinctive in itself and then as a result of this process to conclude that the mark as a whole is not distinctive. Yet this is exactly what has been done not only by the Assistant Registrar but also by Maharajan, J., In *Electrical Protection Company (Proprietary) Limited's Application*[1] where the Registrar has been directed to proceed with the application for registration in Part B of a trade mark consisting of the letters "EPC" written across five concertric circles, it is observed at page 264:—

> " The capability of distinguishing, however, may well be increased as the detail of the mark increases. I would say that in the present case the mark Is primarily a visual mark and has strong and original characteristics. The circles are an integral part of the design and the blocked-in elements, although identifiable as representing the letters "EPC", particularly if one is aware of the initials of the applicant's corporate name, are quite fanciful in character, looking more like an arrangement of bent tubes than any known fount of type. It is for these reasons that I find it difficult to say that the mark is not at least capable of disinguishing the applicant's goods even on the assumption that it has to take its place among various uses of the initials "EPC' by other persons in the same line of business. I consider that is the right conclusion and that it does not conflict with any rule laid down in the cited cases."

9. We are, therefore, of opinion that the appellants' trade mark, considered as a whole, is distinctive and that it is wrong to dissect the mark and show that each of its component parts is not distinctive in itself, and as a result of that process to conclude that the mark is wholly not distinctive. Even if the appellants' mark is not distinctive now, in our opinion, the mark, which has been found to be used from August 1962, if used as a trade mark, is likely to become actually distinctive of the goods of the appellants, having regard to the fact that there is nothing to show that other traders are likely in the course of business and without any improper motive, to desire to use the mark, or one resembling it, upon or in connection with their own goods. Therefore, we hold that the respondens are not entitled to have rectification of the register by expunging the appellants' trade mark and that what should be done under the circumstances, is to transfer the appellants' trade mark from Part A to Part B as was requested on behalf of the appellants at the hearing before the Assistant Registrar of Trade Marks in the respondents' application. The appeal is accordingly allowed with costs and the judgment of Maharajan, J., is set aside. The Assistant Registrar of Trade Marks is directed to transfer the appellants' trade mark from Part A to Part B of the register. The notice required by section 56 (5) of the Act will go to the Assistant Registrar in the prescribed manner for rectification of the register in accordance with this judgment.

R.S. —— *Appeal allowed.*

1. (1967) R.P.C. 261.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. S. Venkataraman and S. Maharajan, JJ.*

Balan *alias* **Balusami Mudali and others** .. *Accused**.

(A) *Criminal Procedure Code* (*V of* 1898), *section* 164—*Statements made under—Evidentiary value of.*

Statements under section 164, Criminal Procedure Code, are not substantive evidence and they could only be used to corroborate the witnesses if they themselves gave direct evidence in the committal Court, that would have been marked as substantive evidence under section 288, Criminal Procedure Code. In the absence of substantive evidence of the witnesses, whether directly given in the Court of session or given in the committal Court and marked under section 288, Criminal Procedure Code, the mere statements of those witnesses under section 164, Criminal Procedure Code cannot be substantive evidence and cannot be used in any manner to corroborate a retracted confession. [*Para.* 9.]

(B) *Evidence Act* (*I of* 1872), *section* 24—*Retracted confession—When may be relied upon.*

A retracted confession cannot be relied on unless it is corroborated. The standard of corroboration required in the case of a retracted confession is not so high as that required in the case of the testimony of an accomplice.

[*Paras.* 11 *and* 12.]

Cases referred to :—

State of Delhi v. *Shri Ram Lohia*, A.I.R. 1960 S.C. 490 ; *Balbir Singh* v. *State of Punjab*, A.I.R. 1957 S.C. 216 ; *Kumaraswami Naicker*, In re., (1963) 1 M.L.J. 330 ; *Haricharan Kurmi* v. *State of Bihar*, (1964) 6 S.C.R. 623 : (1964) 2 S.C.J. 454 : (1964) M.L.J. (Crl.) 535 : A.I.R. 1964 S.C. 1184.

Trial referred by the Sessions Judge of the Court of Session of the Salem Division at Salem for confirmation of the sentence of death passed upon each of the said prisoners in Case No. 65 of the Calendar for 1972 on 30th August, 1972.

N. T. Vanamamalai for *V. Gopinath* and *K. S. Rajagopalan, G. Krishnan, R. Rajaram*, for Accused.

Mrs. Sheela Rajendran, for Public Prosecutor, for State.

The Judgment of the Court was delivered by

Venkataraman, J.—Three persons were tried by the learned Sessions Judge of Salem in connection with the murder of one Palani Chetti. The first accused has been convicted of the offence under section 302, Indian Penal Code, for causing the death of Palani Chetti by squeezing his testicles on 23rd February, 1972. The second accused has been convicted under section 109 and section 302, Indian Penal Code, for abetting the offence of murder by pushing the said Palani Chetti on the ground and by catching hold of the legs of Palani Chetti to enable the first accused to squeeze his testicles. The third accused has been similarly convicted of the offence under section 109 and section 302, Indian Penal Code of abetting the murder, by catching hold of the hands of Palani Chetti when A-1 squeezed his testicles. All the three have also been convicted under section 201, Indian Penal Code. They have been sentenced to death, subject to confirmation by this Court for the major offence under section 302 or section 109 and section 302, Indian Penal Code and to rigorous imprisonment for two years, each for the offence under section 202, Indian Penal Code.

2. Palani Chetti used to purchase fried gram from P.W. 2 (Raman *alias* Ramaswami) and sell it in shandies, in particular at Tiruchengode. P.W. 1, Sellammal, was the concubine of Palani Chetti. She says that Palani Chetti left the house on the morning of Tuesday, 22nd February, 1972 and did not return home thereafter.

3. On Tuesday, 22nd February, 1972, P.W. 2 found Palani Chetti under the influence of drink when he was selling the fried gram at Tiruchengode. P.W. 2

* R.T. No. 75 of 1972.

7th November, 1972.

advised Palani Chetti not to do business after drinking arrack.

4. The prosecution case is that on Wednesday, 23rd February, 1972, Palani Chetti, the three accused, witness Mukkuni *alias* Murugesan (P.W. 5) and witness Balavannan (P.W. 3) played cards from morning till 6 P.M. Palani Chetti won the game. P.W. 3 went away to his house. The rest went away to a toddy-shop. They all drank toddy. The accused and P.W. 5 asked Palani Chetti to pay for the toddy (evidently because he had won the game). But he declined. After taking toddy, they played cards again. At that stage, accused 1 and 2 beat Palani Chetti with hands and he fell down. The third accused caught hold of his hands ; the second accused held his legs ; the first accused squeezed his testicles. Palani Chetti cried that he was dying. In fact he died. The second accused took the dhoti of Palani Chetti, tore it and tied it around the neck of the dead man. He went up a building, and A-1, A-3 and P.W. 5 lifted the body and hung it. The dhoti gave way. Thereafter they hung the corpse from a tree.

5. On 24th February, 1972, the village Headman, P.W. 11, got information that the corpse of a male was hanging in a tree in the shandipet. He went to the spot and saw the body of Palani Chetti hanging from the tree. He sent his usual report to the Police. The Police came on the scene and held the inquest. The post-mortem examination was conducted by the doctor, P.W. 8. She found that death was due to squeezing of the testicles and the contributory cause was asphyxia. The hyoid bone, however, was not broken.

6. The accused are alleged to have been absconding. P.W. 13, the Inspector of Police, arrested accused 2 and 3 on 24th March, 1972 and the first accused on 29th March, 1972. He sent a requisition to the Magistrate to record the confessional statement of the first accused. The first accused was produced before the Sub-Magistrate, P.W. 9 at 1-45 P.M. on 1st April, 1972. P.W. 9 took the usual precautions, gave him the usual warnings and gave him time for reflection till 3rd April, 1972. He repeated the prescribed questions and on being satisfied that the first accused was going to give a voluntary statement, recorded the statement, Exhibit P-8.

7. In Exhibit P-8, the first accused refers to their playing cards together and going to the toddy-shop and to the deceased declining to pay the money for the drinks. He proceeds :

> " We were all drunk. Rajamanickam (A-2) pushed Palani Chetti down and caught hold of his throat. Palani Chetti cried out " Ayyoh ". I squeezed his testicles. The others were by the side. Because I squeezed his testicles, Palani Chetti breathed his last. Rajamanickam (A-2) untied his (deceased's) dhoti, tore it and wound it round the neck and got up a tiled house. We lifted the body and hung it. But the dhoti gave way. Hence we took the corpse to a neighbouring tree and tied it up there. It was about 9 o'clock in the night."

8. Accused 1 retracted his confession both in the committal Court and in the Court of Session and said that he made it because of police pressure. The three accused denied participation in the occurrence. They did not adduce any evidence.

9. Besides the confession, Exhibit P-8, the prosecution sought to rely on the evidence of P.Ws. 3, 5, 6 and 7. In particular, according to them, P.Ws. 5, 6 and 7 were actual witnesses to the murder. But, unfortunately for the prosecution, they turned hostile even in the committal Court, and even in the Sessions Court they were hostile to the prosecution. Because they were hostile to the prosecution even in the committal Court, their depositions in the committal Court were not marked under section 288, Criminal Procedure Code, at the trial, because it would have served no purpose. P.W. 3, also turned hostile to the prosecution at the trial, and his statement in the committal Court was not marked under section 288, Criminal Procedure Code, as even that was virtually hostile to the prosecution. However, all these persons, P.Ws. 3, 5, 6 and 7, had given statements under section 164, Criminal Procedure Code, supporting the prosecution. The learned Sessions Judge has relied upon these statements under section 164, Cri-

minal Procedure Code, as corroborating the retracted confession. In this, he is clearly wrong, because statements under section 164, Criminal Procedure Code, are not substantive evidence and they could only be used to corroborate the witnesses if they themselves gave direct evidence in the committal Court, that would have been marked as substantive evidence under section 288, Criminal Procedure Code. In the absence of substantive evidence of the witnesses, whether directly given in the Court of Session or given in the committal Court and marked under section 288, Criminal Procedure Code, the m re statements of those witnesses under section 164, Criminal Procedure Code, cannot be substantive evidence and cannot be used in any manner to corroborate the retracted confession, Exhibit P-8. The position is well settled. It is enough to refer to the decision of their Lordships of the Supreme Court in *State of Delhi* v. *Shri Ram Lohia*[1], where their Lordships says that statements recorded under section 164, Criminal Procedure Code, are not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness.

10. Since the judgment of the learned Sessions Judge is vitiated by a fundamental error, we have had to examine the evidence ourselves with greater care. So far as the confession of the first accused is concerned, we find one circumstance which throws doubt on its being voluntary. We refer to the circumstance that according to the evidence of P.Ws. 1 and 3, the first accused as well as accused 2 and 3 were kept in the Police Station even from Friday, following the occurrence, that is to say, even from 25th February, 1972, which means a month before the dates of their alleged arrest, according to P.W. 13. If the confession was recorded after detention of the first accused in the custody of the Police for more than a month, obviously it cannot be safely said that it was 'voluntary'. Incidentally we have to point out that the learned Magistrate P.W. 9 should have recorded the questions put to the accused and his answers in view of sections 164 and 364, Criminal Procedure Code, and rule 74 of the Criminal Rules of Practice. He only narrated what happened.

11. Even assuming for the sake of argument, that it was voluntary, still, according to the decisions of the highest Court, corroboration would be necessary, since it has been retracted. It is sufficient to refer to the decision of the Supreme Court in *Subramania Goundan* v. *The State of Madras*[1], where their Lordships point out :

> "But the view taken by this Court on more occasions than one is that as a matter of prudence and caution which has sanctioned itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated—one of the latest cases being *Balbir Singh* v. *State of Punjab*.[2]"

Their Lordships proceed to observe :

> "But it does not necessarily mean that each and every circumstances mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession."

12. Their Lordships point out that the standard of corroboration required in the case of a retracted confession is not so high as that required in the case of the testimony of an accomplice. In that particular case, their Lordships found that the confession was true and genuine and it was further corroborated by the presence of human blood on material objects Nos. 10, 11 and 12 which were recovered from the possession of the accused.

13. In this particular case, we have seen that the principal witnesses, P.Ws. 5, 6 and 7, who were put forward as eye-witnesses to the occurrence, did not support the prosecution. Even if P.W. 3 had given evidence, as was expected by

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1. A.I.R. 1960 S.C. 490.

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1. 1958 S.C.R. 428.
2. A.I.R. 1957 S.C. 216.

the prosecution, and had not turned hostile, it would have only meant that the accused and the deceased were together sometime before the occurrence and would not have carried matters further.

14. The learned Sessions Judge has referred to the evidence of P.W. 4 in the committal Court that he found the deceased in the company of the accused and P.W. 5 in the toddy-shop on the date of occurrence at about 6 P. M. that they took toddy, that the accused and P.W. 5 demanded money from the deceased for paying for the toddy, but that the deceased refused to pay and so there was a quarrel amongst them and that he (P.W. 4) after witnessing this quarrel, left for his house. We may at once observe that the evidence of P.W. 4 in the committal Court was not brought on record under section 288, Criminal Procedure Code, at all. Actually a sentence of his evidence in the committal Court was brought on record as Exhibit D-4 by the defence to contradict him. Hence, legally, it was not permissible for the learned Sessions Judge to rely on any other portion of the evidence of P.W. 4 given in the committal Court (see *Kumaraswami Naicker*, In re.[1]). It may further be observed that even if it was permissible to look into that evidence, it would not have carried matters far, because, it did not relate to the actual quarrel in which the accused are alleged to have committed murder of Palani Chetti ; it referred to an antecedent quarrel.

15. It is true that the medical evidence may be said to corroborate the confession to some extent, because the doctor found that death was due to squeezing of the testicles and asphyxia was the contributory cause. But at the same time, we are bound to remark that though in the confession, the first accused said that the second accused pressed the throat of the victim, the hyoid bone was intact. But this medical evidence would not necessarily show that the persons who committed the murder were all or any of the accused.

16. Thus the fact remains that besides the confession, Exhibit P-8, there is absolutely no evidence to connect any of the accused with the murder. There were not even blood-stains on the garments of any of the accused.

17. For all the above reasons, we feel bound to set aside the convictions of the first accused.

18. We might straightaway observe that so far as the second and third accused are concerned, there was absolutely no justification for the learned Sessions Judge to convict them, because, so far as they are concerned, the statements of P.Ws. 5, 6 and 7 under section 164, Criminal Procedure Code, are not substantive evidence and under those circumstances the confession of the first accused could not even be taken into consideration under section 30, Evidence Act. The meaning of section 30, Evidence Act, as pointed out in more decisions than one, is that if, apart from the confession of the co-accused, there is sufficient evidence against the remaining accused, which if accepted, would be sufficient to sustain a conviction the confession of the co-accused may be used to lend assurance to that evidence in order to convict the remaining accused. *Haricharan Kurmi* v. *State of Bihar*[1].

19. In the result, we set aside the convictions and sentences of the accused, acquit them and set them at liberty. The appeals are allowed.

V.K. *Appeals allowed.*
Accused acquitted.

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1. (1963) 1 M.L.J. 330.

1. (1964) 6 S.C.R. 623 : (1964) 2 S.C.J. 454 : (1964) M.L.J. (Crl.) 535 : A.I.R. 1964 S.C. 1184.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*B. S. Somasundaram, J.*

Mohanlal .. *Petitioner**

Criminal Procedure Code (*V of* 1898), *sections* 523, 439 *and* 561-A—*Police arresting a person on suspicion and releasing him on bail—Money found on him seized by police—Such money taken away by income-tax authorities under a warrant issued under section* 132 *of Income-tax Act—Direction for refund of such amount—If can be ordered under sections* 523, 439 *or* 561-*A*.

Where the income-tax authorities have taken away a certain sum, under the authority of a warrant issued under section 132 of the Income-tax Act, 1961 from the police, who had earlier seized the same from a person arrested on suspicion and released on bail, the income-tax authorities cannot be directed to return the amount under sections 523, 439 or 561-A of the Criminal Procedure Code. [*Para.* 5.]

The proceedings before the Income-tax authorities are not criminal proceedings and the income-tax authority is not a Court. The statutory power conferred on the income-tax authorities cannot be interfered with by the exercise of powers under section 439 or under the inherent powers of the Court under section 561-A, Criminal Procedure Code, when there was no case pending at the time excepting that the person against whom the investigation has started had appeared before the Court, had surrendered and had been admitted to bail. [*Para.* 2.]

Cases referred to :—

Balwant Singh v. *Bharupal, Income-tax Officer, New Delhi*, (1968) 70 I.T.R. 89; *State of West Bengal* v. *Basak*, (1963) M.L.J. (Crl.) 515 : (1963) 2 S.C.R. 52 : (1963) 2 S.C.J. 428 : A.I.R. 1963 S.C. 447 ; *Emperor* v. *Nazir Ahmed*, (1945) 1 M.L.J. 86 : L.R. 71 I.A. 203 ; 58 L.W. 57 ; A.I.R. 1945 P.C. 18; *Basava Kom Dyamangouda Patil* v. *State of Mysore and others*, (1970) M.L.J. (Crl.) 804.

* Crl.R.C. No. 1608 of 1970,
Crl.R.P. No. 1597 of 1970 and
Crl.M.P. No. 5957 of 1970. *7th April*, 1972.

Petition under sections 435 and 439, Criminal Procedure Code, 1898 praying the High Court to revise the order of the Chief Presidency Magistrate, Egmore, Madras, dated 10th December, 1970, in R. S. C. No. 346 of 1970 etc.

Jose Ukkur and *M. V. Kurriyakku*, for Petitioner.

C. K. Venkatanarasimhan, Special Counsel for Income-tax and the Additional Public Prosecutor, for State.

The Court made the following

ORDER.—On the 19th November, 1970, the Inspector of Police attached to the P. I. B., C. I. D., Madras, stopped the bus M. L. J. 4300 near Guindy and arrested one A. K. Ramu on suspicion under section 54 of the Criminal Procedure Code. He seized from him Rs. 1,12,000 (currency notes). Ramu who was sent to Court was remanded to custody. Later, he was released on bail by the Court on 21st November, 1970. The amount seized was not sent to Court. But on the same day, it was taken away from the Police Station by the Assistant Director of Inspections (Income-tax Intelligence) under the authority of a warrant issued by the Commissioner of Income-tax under section 132 of the Income-tax Act, 1961. Mohanlal, the present petitioner, filed an application before the Chief Presidency Magistrate, for the return of this amount. Observing that the matter does not fall within the purview of section 523, Criminal Procedure Code, the learned Magistrate dismissed his application. The correctness of this order is now canvassed in this revision.

2. Under section 523, Criminal Procedure Code, when such a seizure is done by a Police Officer, he should forthwith report the matter to the Magistrate and the latter should make such orders as he thinks fit, respecting the disposal of such property, or the delivery of the property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property. Ramu was arrested by the Inspector with the amount on suspicion. He was sent for remand to Court. The currency notes were not sent but they were retained in

the police station. Those notes were taken away from the station by the Assistant Director of Inspections under the authority of a warrant issued by the Commissioner of Income-tax under section 132 of the Income-tax Act. Later, the Commissioner had issued a notice to the petitioner under section 132 (5) read with section 132 (7) of the Income-tax Act. The petitioner participated in this enquiry and the Commissioner had passed an order directing the return of Rs. 44,240 to the petitioner. The balance of the amount is now with him awaiting disposal as provided for in section 132 (*a*) of the Income-tax Act. The Income-tax Officers have thus seized the amount under the authority conferred on them by the statute. They have powers to deal with the seizures and deposits under the provisions of that Act. The proceedings before the Income-tax authorities are not criminal proceedings and the Income-tax authority is not a Court. Vide *Balwant Singh* v. *Bharupal, Income-tax Officer, New Delhi*[1]. As pointed out by their Lordships of the Supreme Court in *State of West Bengal* v. *Basak*[2], this statutory power cannot be interfered with by the exercise of powers under section 439 or under the inherent powers of the Court under section 561-A, Criminal Procedure Code, when there was no case pending at the time excepting that the person against whom the investigation has started had appeared before the Court, had surrendered and had been admitted to bail. This was a case which related to the powers of interference with the statutory right of investigation conferred upon the police under section 156 of the Criminal Procedure Code. In *Emperor* v. *Nazir Ahmed*[3], their Lordships of the Privy Council observed as below :

"The functions of the judiciary and police are complementary, not overlapping and the combination of indivdual liberty with due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case, when moved under section 491, Criminal Procedure Code, to give directions in the nature of *habeas corpus*. The Court's functions begin when a charge is preferred before it and not until them, and therefore, the High Court can interfere under section 561-A only when a charge has been preferred and not before."

1. (1968) 70 I.T.R. 89.
2. (1963) M.L.J. (Crl.) 515 : (1963) 2 S.C.R. 52 : (1963) 2 S.C.J. 428 : A.I.R. 1963 S.C. 447.
3. (1945) 1 M.L.J. 86 : 71 I.A. 203 : 58 L.W. 57 : A.I.R. 1945 P.C. 18.

3. Granting that the Inspector of the Income-tax authorities exceeded his jurisdiction, one in seizing this amount and the other in handing over the same, even then whatever remedies the petitioner might have, the remedy will not be under section 561-A, Criminal Procedure Code.

4. There are two kinds of properties that are dealt with under the Criminal Procedure Code, firstly, those that are seized by the police and produced before the Court during enquiry or trial and secondly, those which are seized by the police and not produced during the enquiry or trial. The police are empowered to seize the properties during the course of the investigation. Section 523 enjoins a duty on them to report the matter to the Magistrate. If the property is produced before the Court, the Court is empowered to pass an order in respect of it under section 516-A or under section 517, Criminal Procedure Code. But if the property is not produced before the Court, but remains with the police, then, as pointed out in *Basava Kom Dyamangouda Patil* v. *State of Mysore and others*[1], under section 523, Criminal Procedure Code, power is given to the Court to make such order as it thinks fit respecting the disposal of such property. In any case, the property must be available. Even assuming that due to negligence of the Police Officers, the property was stolen and it was not detected so long as the property is not available, the Magistrate cannot make an order under section 517, Criminal Procedure Code, nor could any direction be given for the return of the value thereof by virtue of the powers under section 561-A, Criminal Procedure Code.

1. (1970) M.L.J. (Crl.) 804.

5. Here, in this case, the property is not available with the police. Under the authority of a warrant issued by the Commissioner of Income-tax the Officers of that department have taken custody of this amount from the police station. Proceedings are now pending before the Commissioner of Income-tax. These proceedings are not criminal proceed-dings. No case is now pending before any Court. The statutory powers conferred on the income-tax authorities to deal with the seizure canot be interfered with by the exercise of the powers under section 439 or under the inherent powers of the Court under section 561-A of the Criminal Procedure Code. The petitioner in this case prays for an order directing the Commissioner of Incme-tax to return the amount seized to him. For the reasons given above, no such direction can be given.

6. The revision fails and the same is dismissed.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. S. Venkataraman and S. Ganesan, JJ.*

Gurumurthy and another

.. *Appellants**

Madras Criminal Rules of Practice and Circular Orders (1958), *Rules* 100 *and* 166—*Grave case of murder—Imperative duty of Sessions Judge to appoint Counsel to defend accused—Scope, effect and requirements of rules* 100 *and* 166.

It is the imperative duty of a Magistrate who holds a preliminary enquiry to conform strictly to the provisions of rule 100 of the Madras Criminal Rules of Practice while discharging his duty of reporting to the Sessions judge about the necessity for appointing a Counsel at the sessions. It must be remembered that he has to report on two specific points : (1) whether the accused intends to appoint a pleader to defend him at the Sessions; and (2) whether, in case he does not intend to appoint a pleader, is possessed of sufficient means to do so and it necessarily follows that he must specifically put two independent questions to the accused on these two points. [*Para.* 7.]

It is the imperative duty on the part of the Sessions Judge to appoint a State Counsel in a case where the conditions imposed by rule 166 are complied with. [*Para.* 17.]

Normally it is the accused who engages an Advocate to defend him and the Advocate therefore becomes an agent of the latter. Consequently the Advocate is entitled to represent and act on behalf of the accused, but only so long as his authority is not revoked by the latter. The position has, however, been materially altered in Tamil Nadu by the introduction of rules 100 and 166 of the Criminal Rules of Practice and the latter rule not only enables but makes it obligatory on the Court to appoint a Counsel to defend the accused in certain grave cases, though the accused does not want to defend himself and does not seek the assistance of a State Counsel. [*Paras.* 20, 21, 26.]

A State Counsel is admittedly appointed by the State for the purpose of defending the accused and it is therefore open to the accused to say that he does not desire to be defended by that Counsel, in which case the Counsel cannot obviously continue to represent the accused any more and cannot cross-examine witnesses on his behalf and cannot make any submissions on his behalf. But his appointment is not thereby terminated and he does not cease to function any more. He has still the duty as *amicus curiae*, to assist the Court on difficult points of fact or law is the case and must play that role to the best of his ability. [*Para.* 24.]

It is not open to the Sessions Judge to wait till the commencement of the trial for making arrangements for the defence of the accused. It is obvious that such a belated arrangement would not satisfy the requirements of rule 166 and would be open to the just attack that no real opportunity was,under the circumstances, given to the accused to defend himself. The Court of Sessions must ensure that the time granted to the Counsel is sufficient to prepare for the defence. [*Para.* 27.]

*R.T. No. 137 of 1971; Crl.A. Nos. 39 and 40 of 1972. *9th March,* 1972.

Cases referred to :—

Bashira v. *State of Uttar Pradesh,* (1969) 1 S.C.J. 283 : (1969) M.L.J. (Crl.) 172 : (1969) 1 S.C.R. 32: A.I.R. 1968 S.C. 1313; *Reg* v. *Yacuado*, Cox's Crl. Law Cas. Vol. VI, p. 386; *Emperor* v. *Suk Dev*, A.I.R. 1929 Lah. 705; In re, *Palaniappan*, I.L.R. (1961) Mad. 725 : 74 L.W. 358 : A.I.R. 1961 Mad. 417 ; *Pueblods Taos* v. *Archuleta*, C.C.A.N.M. 64-F 2 (d)-801-810, The Corpus Juris Secundum Vol. 3, page 104 ; *Nageswara Rao*, In re, A.I.R. 1957 Andh. Pra. 505.

Trial by the Sessions Judge of the Court of Sessions of the West Thanjavur Division at Thanjavur for confirmation of the sentences of death passed upon the said prisoners in Case No. 75 of 1971 of the Calendar for 1971 on 30th November, 1971, and Appeals by the said prisoners (accused Nos. 2 and 3) against the said sentence of death passed upon each of them and other sentences of imprisonment passed upon each of them and directed to merge with the sentence of death on each of them and by accused Nos. 1 and 4 against the sentence of imprisonment for life passed upon each of them and other sentences passed upon first accused and directed to run concurrently in the said case.

N. T. Vanamamalai, V. Gopinath, R. Ganesan and *G. Krishnan*, for Appellants.

The Public Prosecutor, for State.

The Judgment of the Court was delivered by

Ganesan, J.—The appellants, four in number, have been convicted by the learned Sessions Judge of West Thanjavur Division under various sections of the Indian Penal Code. The first appellant had been sentenced to imprisonment for life for offences under section 120-B, Indian Penal Code, and the third appelland has been sentenced to death and imprisonment for life respectively under sections 302 and 120-B, Indian Penal Code. It is unnecessary to refer to other convictions and sentences.

2. A preliminary objection is raised by Sri N. T. Vanamamalai, appearing on behalf of the appellants that the entire trial is vitiated in so far as the first three appellants are concerned, as the learned Sessions Judge had admittedly not appointed a State Counsel to defend the said appellants. It is pointed out that under rule 166 of the Criminal Rules of Practice and Circular Orders, 1958, the Sessions Judge has an imperative duty to engage a pleader to defend an accused person in grave charges like murder and that the action of the Sessions Judge in not appointing a State Counsel to defend the accused is violative of Article 21 of the Constitution of India which provides that no person shall be deprived of his life or personal liberty, except according to procedure established by law. It is, therefore, alleged that the trial is vitiated and totally void.

3. The material facts relevant to the decision are shortly these. The first three appellants claim to be Naxalites and refused to plead to the charges when read out by the Sub-Magistrate who held the preliminary enquiry ; and when they were specifically asked at the end of the enquiry whether they had means to engage Advocates at the Sessions trial they uniformly refused to answer the question. At the Sessions, they refused to plead when the charges were read out to them individually ; and it is seen from the order passed by the learned Sessions Judge on 15th November, 1971 that, before the commencement of the trial, the learned Sessions Judge questioned appellants 1 to 3 as to whether they have means to defend or whether they may be defended at the cost of the State and that the said appellants stated that they did not want to defend themselves as they had no faith in the Courts and in the law of the land as they are Naxalites. The fourth appellant who had told the Sub-Magistrate that he had no means to engage an Advocate at the Sessions was defended by a State Counsel at the Sessions.

4. Section 340 of the Criminal Procedure Code, provides that any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right, be defended by a pleader. Admittedly, appellants 1 to 3 cannot complain of any breach of this section as

they have clearly expressed that they did not want to engage a Counsel for defending themselves; and it is not therefore suggested that the provisions of section 340, Criminal Procedure Code, are in any way violated in this case.

5. The relevant provisions of the Criminal Rules of Practice and Circular Orders, 1958, are rules 100 and 166. Rule 100 runs thus:

"*Committing Magistrates to report on means of accused.*—To enable the Court of Sessions to arrive at a decision as regards the second condition in rule 166, the Committing Magistrate shall in such cases make enquiries and report in the preliminary register whether the accused has means to appoint a pleader, and if not, whether he is, in the opinion of the Magistrate, possessed of sufficient means to do so. Each case must be decided on its merits, and no hard and fast rule as to insufficiency of means shall be applied".

6. Rule 166 is to the following effect:—

"In any case which comes before the High Court or a Court of Session, the Court shall engage a pleader to defend an accused person if: (1) the charge against him is such that a capital sentence is possible; and (2) it appears that he has not engaged a pleader and is not possessed of sufficient means to do so. The Court may, subject to condition (2) above, engage a pleader to defend an accused person against any other charge, if it considers it desirable to do so in the interests of justice."

7. We would like to point out at this stage that it is the imperative duty of a Magistrate who holds the preliminary enquiry to conform strictly to the provisions of rule 100 while discharging his duty of reporting to the Sessions Judge about the necessity for appointing a Counsel at the Sessions. The Magistrate is bound to make enquiries before making a report and it is open to him to call for reports from the revenue and police officials, if necessity arises. The Magistrate can rest his conclusion on the answers elicited by him from the accused when examining him under section 342, Criminal Procedure Code. It must be remembered that he has to report on two specific points: (1) whether the accused intends to appoint a pleader to defend him at the Sessions, and (2) whether, in case he does not intend to appoint a pleader, is possessed of sufficient means to do so; and it necessarily follows that he must specifically put two independent questions to the accused on these two points. But we find from the records that the learned Magistrate who held the preliminary enquiry in this case has chosen to put only one question, namely, whether the appellants had means to engage a Counsel for defending themselves at the Sessions. In our view, the conditions of rule 100 cannot be deemed to have been fully complied with in this case; it may be that no prejudice is likely to be caused in this case, because in all likelihood the appellants would have refused to answer, if asked, whether they meant to appoint a pleader to defend themselves at the Sessions. We are, however, clear that the Committing Magistrate is bound to put the two specific questions referred to above to the accused in order to satisfy the provisions of rule 100. We would, however, like to point out that the learned Counsel for the appellants has not made any grievance out of this lapse on the part of the Committing Magistrate.

8. The main contention of the learned Counsel is based upon the provision of rule 166; and emphasis is laid on the use in that rule of the words "shall engage a pleader". It is pointed out by him that, the words used were "the Court may engage a pleader" and that the word "shall" had been deliberately substituted by the High Court in P. Dis. No. 431 of 1948. According to the learned Counsel, it is the imperative duty of the learned Sessions Judge to have appointed a State Counsel, when the Sub-Magistrate who held the enquiry had stated on the committal order that they had no means to defend themselves at the Sessions even though they did not want to defend themselves when the learned Sessions Judge questioned them at the commencement of the trial whether they have means to defend or whether they may be defended at the cost of the State.

9. Reliance is placed by the learned Counsel on the decision of the Supreme Court in *Bashira* v. *State of Uttar Pradesh*[1]. In that case a State Counsel was admittedly engaged to defend the accused at the Court of Sessions but the Counsel was appointed only on the date fixed for the trial and records were given to him only then ; but, admittedly, the Counsel did not ask for more time to prepare the defence and he did his level best to cross-examine the witnesses to the extent it was possible for him to do in the very short time available to him. The grievance was that the provisions of rule 37 of the Allahabad High Court General Rules (Criminal) (1957) have not been complied with.

10. Rule 37 of the Allahabad High Court General Rules (Criminal) (1957) runs as follows :—

> "In any case which comes before a Court of Session, the Court may engage Counsel to defend the accused person if—
>
> (*a*) the charge against him is such that a capital sentence is possible, and
>
> (*b*) it appears that he has not engaged Counsel and is not possessed of sufficient means to do so.
>
> To enable the Sessions Court to arrive at a decision as regards the second condition in the preceding paragraph, the committing Magistrate shall in such cases make enquiries from the accused at the time of commitment and after making such other enquiries as may be necessary, report within a month of the commitment order to the Court to which the commitment is made whether the accused is possessed of sufficient means to engage Counsel. Each case must be decided on its merits and no hard and fast rule as to sufficiency of means should be applied. The Sessions Court in making its decision shall not be bound by the report of the committing Magistrate.
>
> Counsel appointed under this rule shall be furnished with the necessary papers free of cost and allowed sufficient time to prepare for the defence."

11. It was contended by the learned Counsel for the State that the rule should not be held to be mandatory, but was only enacted to enable a Court to engage a Counsel to defend a person accused of an offence punishable with capital sentence, but the contention was rejected by the Supreme Court ; and their Lordships have observed that, though the word used in the rule was "may", in their opinion, the purpose of the rule would be completely defeated, if they had to accept this submission, that the intention of the rule was perfectly clear that no accused person should remain totally unrepresented by a lawyer, if he was tried on a charge for which capital sentence can be awarded and that considering the purpose of the rule, the word "may" in the rule must be interpreted as laying down a mandatory direction to the Courts to engage a Counsel, if the conditions laid down in the rule are otherwise satisfied.

12. Their Lordships upheld the contention of the accused in that case that, though the record did not contain any note that the Counsel asked for more time to prepare the defence, there was no compliance with the requirements of rule 37 and have observed that the rule cast a duty on the Court itself to grant sufficient time to the Counsel for preparing the defence and that, as the trial was proceeded with immediately after the appointment of the *amicus curiae* Counsel, the time given was nominal.

13. On behalf of the State strong reliance is placed on the English case *Reg.* v. *Yacuado*[1]. A Spaniard was tried before Hertford Assizes and evidence was given to the effect that, though he had talked in Spanish with a person sent from the Spanish Embassy to assist him in his defence, he had later declared that he would never speak again and from that time he had never uttered a word. When the evidence was read over through an interpreter by the Judge, he remained silent. Mr. Rodwell who appeared for the prosecution then suggested to the Court that, under the peculiar circumstances of the case, Counsel should be assigned to the foreigner and Mr. Parry volunteered to defend him ; and Erle, J.,

1. (1969) 1 S.C.J. 283 : (1969) M.L.J. (Crl.) 172 : (1969) 1 S.C.R. 32 : A.I.R. 1968 S.C. 1313.

1. Cox's Crl. Law Case, Vol. VI, p. 386.

asked the foreigner whether he wished to have the services of Counsel to defend him, but no reply was given. It was suggested by Mr. Parry, that the foreigner must be presumed to have understood all that was interpreted to him and that if on being told that a certain Counsel had been assigned by the Court to conduct his defence, he did not repudiate him, it might be taken that he assented to such a course. The learned Judge observed that the foreigner was not bound to give any assent to the proposition and that he did not see how he could infer an assent from his silence. The learned Judge has further observed that, even in the case of treason where the Court may, by a special Act of Parliament, assign Counsel to a prisoner, it can be only done at his request and held, that, under the circumstances, he had no authority to assign Counsel to a prisoner without his consent, as in such an event he would be authorizing a defence which the prisoner himself would never have made, and yet for which he must be held responsible.

14. The second case relied upon by the learned Public Prosecutor is *Emperor* v. *Sukh Dev*[1] and a Division Bench of the Lahore High Court has relied on *Reg.* v. *Yacuado*[2], referred to above and has made the following observations :

> " Where the accused is not represented by a pleader and is unable to attend personally because of illness, the Court cannot proceed with the case by assigning him a pleader, for such a Counsel is neither chosen by him nor given to him with his express or implied consent and in fact does not really represent him ; and no Court has any authority to force upon a prisoner the services of a Counsel if he is unwilling to accept them. The employment of a Counsel places him in a confidential position which, of course, will not exist in the case of a pleader, assigned without the accused's consent. Moreover, the pleader might advance a defence which the accused will never have made and yet for which he must be responsible."

15. The last case cited is the decision of a Division Bench of this Court in In re, *Palaniappan*[1]. Anantanarayanan, J. (as he then was), observed that the right of the Counsel appointed at Government cost under rule 166 of the Madras Criminal Rules of Practice to put questions to the witnesses on behalf of the accused depends entirely upon the continuance of the representation, which, in its turn, depends upon the express or implied consent of the accused ; and where the consent has been expressly repudiated by the accused, the interests of justice require that the accused should be permitted to put questions himself, supplemented if necessary, by exertions of the Counsel. Veeraswami, J. (as he then was), has observed that it is hardly necessary to mention that one who is represented by another has always got the right to terminate the authority ; but where the authority is not terminated by the accused, the fact that he is represented by a Counsel does not in any way stand in the way of the accused to cross-examine the witnesses.

16. It must, however, be noted that the Division Bench of this Court has also made the following observations :—

> " Rule 166 of the Madras Criminal Rules of Practice, under which a Counsel is appointed at Government cost to take instructions from the accused and to defend him, is mandatory in its terms; it should be complied with in all cases to which that rule refers."

17. Construing the provisions of rule 166 of the Criminal Rules of Practice and Circular Orders as they stand and taking into account the fact that the words used are " shall engage a pleader", we agree with the observations made by a Division Bench of this Court in In re, *Palaniappan*[1], cited above that it is the imperative duty on the part of the Sessions Judge to appoint a State Counsel in a case where the conditions imposed by rule 166 are complied with. In arriving at this conclusion, we have also taken note of the fact that the old rule containing the word " may " had been amended by this Court by substituting the word " shall " for " may " and that the Supreme Court had cons-

1. A.I.R. 1929 Lah. 705.
2. Cox's, Crl. Law Cases, Vol. VI, p. 386.

1. I.L.R. (1961) Mad. 725 : 74 L.W. 358: A.I.R. 1961 Mad. 417.

trued rule 37 of the Allahabad High Court Rules as casting an imperative duty on the Sessions Judge to appoint a State Counsel. We have also taken note that the consent of the accused is not made a condition precedent for such appointment.

18. The conditions imposed by rule 166 are: (1) that the charge against the accused must be such that he is liable to be sentenced to death; (2) that he has not engaged a pleader; and (3) is not possessed of sufficient means to do so. Admittedly, conditions 1 and 2 are complied with in this case and in view of the report made by the committing Magistrate that appellants 1 to 3 have no means to engage advocates at the Sessions in spite of the fact that the appellants have refused to answer that question, condition 3 may also be taken to have been complied with. Under these circumstances, this would normally be a fit case in which the learned Sessions Judge should have engaged a Counsel at the cost of the State to defend the appellants.

19. The only point which requires consideration is whether an appointment of a State Counsel by the learned Sessions Judge in this case was unnecessary, because appellants 1 to 3 have distinctly stated in answer to a question by the learned Sessions Judge whether they have means to defend or whether they may be defended at the cost of the State, that they did not want to defend themselves at all.

20. Normally, it is the accused who engages an Advocate to defend him and the Advocate therefore becomes an agent of the latter. Consequently the Advocate is entitled to represent and act on behalf of the accused, but only so long as his authority is not revoked by the latter. As the position is one of mutual trust and confidence, no such relationship can be created by any external agency, much less by a Court; and the Court will not therefore normally be entitled as observed by Erle, J., in *Reg* v. *Yacuado*[1], cited above, to assign a Counsel to the accused, as in such a case, it cannot be said that the Counsel (assigned by the Court) is one engaged by or is acting with express or implied consent of the accused.

21. The position has, however, been materially altered in Tamil Nadu by the introduction of rules 100 and 166 of the Criminal Rules of Practice; and the latter rule not only enables, but makes it obligatory on the Court to appoint a Counsel to defend the accused in certain grave cases. The legality of these rules is not challenged. All these rules were admittedly framed by this High Court in exercise of the powers conferred on it by the Constitution or by the Code of Criminal Procedure; and the Supreme Court has in *Bashir* v. *State of Uttar Pradesh*[1], cited above, affirmed that rule 37 of the Allahabad High Court, which substantially corresponds to rule 166 of the Madras Criminal Rules of Practice, has statutory force. It is therefore clear that these rules form part of the procedure for trial of the criminal cases by Courts subordinate to High Court, in addition to the procedure laid down by the Code of Criminal Procedure. The observations of Erle, J., reflect the law of England and cannot apply to Tamil Nadu where a significant change has been effected by rules 100 and 166 of the Criminal Rules of Practice.

22. It is pointed out by the learned Public Prosecutor that appellants 1 to 3 have categorically stated that they did not want to defend themselves; and it is therefore urged that no useful purpose would be served by the appointment of a State Counsel, specially when it is perfectly clear from their attitude as Naxalites that they were sure to refuse to be defended by the State Counsel even if one had been appointed in spite of their clear and positive stand that they would not like to be defended. The argument sounds attractive at the outset, but cannot be upheld on a closer examination of the object and purpose for which the rules 100 and 166 have been introduced.

23. It is, no doubt, seen from the provisions of rule 166 that a Counsel has to be appointed for the purpose of defending an accused who has not engaged a pleader and is not possessed of sufficient means

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1. 6 Cox. C.C. 386.

1. (1969) 1 S.C.J. 283: A.I.R. 1968 S.C. 1313.

to be defended : but then the significance of the further condition that " the charge against him must be such that a capital sentence is possible " should not be lost sight of. It appears to us clear that the object underlying the rule is twofold, namely: (1) to make provision for the defence of the accused; and (2) also to provide legal assistance to Courts in grave cases of crime like murder and treason where facts and law are likely to be intricate and complicated. It must be remembered that the State Counsel appointed under rule 166 is generally known as " *amicus curiae* ". The term " *amicus curiae* " literally means a friend of the Court. (Vide *Pueblods Taos* v. *Archuleta*[1]. The Corpus Juris Secundum Vol. 3, page 104.) In that book, "*amicus curiae* " is defined as one who is not a party to the proceedings, but who advises or informs the Court or one who is allowed to appear to protect an interest he represents. The term is defined in Ramanatha Iyer, (*sic*) Law Lexicon, Vol. 1 (at page 62) as a member of the bar or other standards who helps the Court in removing the doubtful or mistaken view of any fact or decided case.

24. A State Counsel is admittedly appointed by the State for the purpose of defending the accused ; and it is therefore open to the accused to say that he does not desire to be defended by that State Counsel, in which case the Counsel cannot obviously continue to represent the accused any more and cannot cross-examine the witnesses on his behalf and cannot make any submissions on his behalf ; but his appointment is not thereby terminated and he does not cease to function any more. He has still the duty, as *amicus curiae*, to assist the Court on difficult points of fact or law in the case and must play that role to the best of his ability.

25. It may be that appellants 1 to 3 would have refused to be defended by any State Counsel appointed by the Sessions Judge, but that contingency would have arisen only after the appointment had been made. In any event, it must be remembered that the State Counsel has to play his role as *amicus curiae* and help the Court by his submissions on intricate questions of fact and law.

26. For the foregoing reasons we are satisfied that the learned Sessions Judge in this case had the imperative duty to appoint a State Counsel to defend appellants 1 to 3 in pursuance of the provisions of rule 166 of the Criminal Rules of Practice, though the said appellants did not want to defend themselves and did not seek the assistance of a State Counsel for that purpose.

27. It is obvious that the learned Sessions Judge could have avoided all this controversy, if he had within a few days after receiving the committal order, appointed a State Counsel to defend all the appellants and did not wait until the commencement of the trial for that purpose. Admittedly, the committing Magistrate had in his committal report clearly stated that all the four appellants had no means to defend them at the Sessions trial, in spite of the fact that appellants 1 to 3 refused to answer the question whether they had means to defend themselves at the Sessions. We are clear that under the circumstances it was not open to the learned Sessions Judge to have waited till the commencement of the trial for making arrangements for the defence of the appellants. It is obvious that such a belated arrangement would not satisfy the requirements of rule 166 of the Criminal Rules of Practice and would be open to the just attack that no real opportunity was under the circumstances, given to the appellants to defend themselves. This practice has been strongly deprecated by the Andhra Pradesh High Court in *Nageswara Rao*, In re[1], by the Kerala High Court in *Mathai Thoman* v. *State*[2] and by the Supreme Court in *Bashira* v. *State of Uttar Pradesh*[3]. In the cases before the Andhra Pradesh and Kerala High Courts, only about 2 days were available for the State Counsel to prepare the defence ; and the learned Judges of the Kerala High Court

1. C.C.A.N.M. 64-F 2 (*d*), 801-810.

1. A.I.R. 1957 A.P. 505.
2. (1959) M.L.J. (Crl.) 420 : 1958 K.L.T. 1125 : A.I.R. 1959 Ker. 241.
3. (1969) 1 S.C.J. 283 ; A.I.R. 1968 S.C. 1313.

have pungently observed that practices like this would reduce to a farce the engagement of a Counsel under rule 21 (of the Criminal Rules of Practice of the Kerala High Court) which had been made for the purpose of effectively carrying out the duty cast on the Court to see that no one is deprived of life and liberty without a fair and reasonable opportunity being afforded to him to prove his innocence. Their observation that, at least 10 or 15 days before the trial should be allowed for the Court to prepare the defence have, no doubt, not met with the full approval of the Supreme Court in the case referred to above ; but their Lordships are clear that the Court of Session must ensure that the time granted to the Counsel is sufficient to prepare for the defence. We do hope that, in future at least, the Sessions Judges would avoid such serious lapses.

28. In the view we have taken that rule 166 is mandatory in terms, it necessarily follows that the learned Sessions Judge was in error in not appointing a State Counsel to defend appellants 1 to 3 at the Sessions trial and that the trial is accordingly vitiated as having been held in violation of a statutory rule. The convictions and sentences of appellants 1 to 3 are accordingly set aside ; but we are, however, satisfied that appellants 1 to 3 must stand their trial once again before the learned Sessions Judge on the same charges, after a State Counsel had been appointed under the provisions of rule 166 of the Criminal Rules of Practice.

29. The learned Counsel urges that the case against the fourth appellant should be disposed of now itself, particularly when he had been fully defended by the State Counsel engaged by the learned Sessions Judge and also points out that no useful purpose would be served by a retrial. According to him, considerable prejudice may, on the other hand, result to the appellant in the case of retrial. We are, however, satisfied that, in the interests of justice, the same procedure must be followed in the case of the fourth appellant as in the case of appellants 1 to 3.

30. The case against the appellants is inter-connected and the fourth appellant has been charged along with the other appellants under section 120-B, section 147 and also under section 307 read with section 149 of the Indian Penal Code. A decision of the case against the fourth appellant alone is bound to cause considerable embarrassment to the learned Sessions Judge who will have to deal with the case against the other appellants after remand; and we would also like to avoid the possibility of conflicting judgments in this case. Further, in our opinion, there will be no prejudice at all to the fourth appellant as a result of the retrial.

31. In the result, the convictions and sentences passed by the learned Sessions Judge, West Thanjavur, on all the appellants are hereby set aside ; and, in view of the fact that the learned Sessions Judge, Thiru C. M. Kuppannan, who conducted the trial in the case continues to preside over the Sessions at West Thanjavur, it is but proper that the case should be tried by another Judge ; and accordingly the sessions case is remanded to the Court of Session, East Thanjavur, for fresh trial.

32. Before the trial is commenced, the learned Sessions Judge will first appoint a State Counsel for all the appellants under rule 166 of the Criminal Rules of Practice sufficiently in advance in order to enable the Counsel to prepare the defence and then proceed with the trial. If the learned Sessions Judge finds that there is conflict of interest between the appellants, he will have to appoint more than one Counsel according to the necessities of the case. If any of the appellants does not, however, desire to have the services of the Counsel appointed by the Court to defend him, the Judge will permit him to cross-examine the witnesses by himself, if he so desires. Even then it will be the duty of the Counsel appointed by the Court to act as *amicus curiae* and assist the Court on points of fact and law in particular. He will endeavour to bring out all the relevant omissions, contradictions and improvements as can be gathered from the prior statements under sections 161 and 164, Criminal Procedure Code, and the evidence in the committal Court,

33. We would also like to emphasize that, in such cases, the Sessions Judge has a greater obligation to peruse the case diary and prior statements of the witnesses with more care than usual and elicit in favour of the appellants contradictions and embellishments over prior statements.

Conviction and sentences set aside; Cases remanded.

V.K. ———

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*Maharajan, J.*

P. Murugan .. *Appellant**

v.

Ethirajammal .. *Respondent.*

Criminal Procedure Code (V of 1898), *section* 342—*Scope.*

When there is nothing in the evidence which is against the accused and consequently there is no need for the Magistrate to put any question to the accused for the purpose of enabling him to explain any circumstances appearing against him, it is wrong on the part of the Magistrate to use the power under section 342 (1), Criminal Procedure Code for the purpose of eliciting an admission from the accused and thereby filling a lacuna in the evidence. This section does not enable the Court to cross-examine the accused for the purpose of trapping him or beguiling him into an admission of a fact which the prosecution has failed to establish. [*Para.* 1.]

Appeal against the Judgment of the Ninth Presidency Magistrate of the Court of Presidency Magistrate, Egmore, Madras, in Case No. 4833 of the Calendar for 1970.

P. M. Sundaram, for Appellant.

K. Alagumalai, for Respondent.

Mrs. Sheela Rajendran, for Public Prosecutor, for State.

The Court delivered the following

JUDGMENT.—This is an appeal against the Judgment of the learned Ninth Presidency Magistrate, Egmore, Madras, convicting the appellant of the offence under section 420, Indian Penal Code and sentencing him to undergo rigorous imprisonment for three months and to pay a fine of Rs. 300 and in default to undergo rigorous imprisonment for two months. The learned Magistrate also directed that the sum of Rs. 100 be paid to the complainant as compensation out of the fine. The case of the prosecution was that the accused, Murugan offered to the complainant, Ethirajammal for sale of building in door No. 5, Chunnambukalavai Street, Aminjikarai, that the price of the same was fixed at Rs. 19,500 and that though the accused disclosed to the complainant the fact that the property was subject to two prior mortgages, he failed to disclose an attachment of the property which is alleged to have been subsisting on the date of the sale. The suppression of the fact of attachment is, according to the prosecution, fraudulent and is in fact the basis for the conviction of the appellant of the offence of cheating. It is surprising that the prosecution has made no attempt to prove that on the date of the sale, *i.e.*, 10th July, 1967, any attachment of the property was in force. It is said that a Marwadi had obtained a decree against the appellant and in E.P. No. 581 of 1968 attached the property of the appellant in execution. In support of this allegation, Exhibit P-2 a copy of the sale proclamation, has been produced. Exhibit P-2 shows that it was issued on the 20th of December, 1969, whereas the sale effected by the appellant preceded Exhibit P-2 by two years. There is nothing in the sale proclamation to show if and when the attachment of the property was effected by the decree-holder. One would expect the prosecution to have produced the order of the Court directing attachment and the endorsement of the bailiff effecting attachment of the property in pursuance thereof. Where unimpeachable documentary evidence is available to prove the date and factum of the attachment, the prosecution has failed to produce the same and has chosen to rely entirely upon the sale proclamation, which has come into being two years after the date of the appellant's sale and which makes no mention of the alleged attachment. If the prosecution has failed to prove that on the date of the

*Crl.A.No. 618 of 1970. 1st December, 1972.

sale, there was an attachment in force, then there is no basis for the complaint that the appellant failed to disclose that attachment in the sale deed and that he did so fraudulently and thereby committed the serious offence of cheating. Learned Counsel for the complainant draws my attention to an endorsement made by the trial Magistrate on 22nd April, 1970. That endorsement was made under the following circumstances. P.W. 1, the complainant, went into the witness box and said that there were no direct negotiations at all between her and the appellant, that she did not know the appellant at all, that the sale negotiations were conducted through a broker and that she did not even attend the Registrar's office at the time of the registration of the sale-deed. By these disastrous admissions she gave away her entire case. It was at this stage the learned Magistrate appears to have made an attempt to salvage the prosecution case by putting some questions to the appellant. It is unfortunate that the Magistrate did not record the questions that he put. No doubt under section 342 (1), Criminal Procedure Code, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any enquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. There was nothing in the evidence of P.W. 1, which was against the accused and consequently there was no need for the learned Magistrate to put any question to the accused for the purpose of enabling him to explain any circumstance appearing against him. It was wrong on the part of the Magistrate to have used the power under section 342 (1), Criminal Procedure Code, for the purpose of eliciting an admission from the accused and thereby filling a lacuna in the evidence of P.W. 1. This section does not enable the Court to cross-examine the accused for the purpose of trapping him or beguiling him into an admission of a fact which the prosecution has failed to establish. Further, the endorsement made by the Magistrate has not been signed by the accused-appellant, and it is to the following effect :

> " I told vakil there was attachment by the Court."

This endorsement is recorded on 22nd April, 1970, that is to say, three years after the date of the sale. It is not known to which vakil the appellant was making reference in this manner. Probably, it might be to the advocate who was actually defending him in this case. If the attachment had been effected after the date of the sale and if a complaint had been filed against the accused on the ground that he had fraudulently suppressed the fact of attachment, it is conceivable that he should have communicated the information to the advocate who was defending him in the criminal case that there was a subsequent attachment by the civil Court. There is nothing in the answer recorded by the Magistrate to show that the appellant admitted or intended to admit that there was a subsisting attachment on the date he effected the sale. It is, therefore, idle for the prosecution to rely upon some unsigned statement of the appellant, which is ambiguous in its meaning and which cannot relieve the prosecution of the burden of establishing the most important ingredient in the offence of cheating, namely, that, on the date the appellant executed the sale, there was a subsisting attachment in respect of the property, that the appellant was aware of that attachment and that he fraudulently suppressed the factum of the attachment from the knowledge of his vendee. In the absence of proof of this most important ingredient, the conviction and sentence imposed upon the appellant have to be set aside and I acquit the accuesd-appellant of the offence under section 420, Indian Penal Code, direct him to be set at liberty forthwith, and direct his bail bond to be cancelled. The fine, if collected, will be refunded to the appellant.

V.K. *Order accordingly.*

[END OF VOLUME (1974) II M.L.J. (REPORTS).]